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No. 2355

United States
Circuit Court of Appeals

For the Ninth Circuit.

STONE-ORDEAN-WELLS COMPANY, a Cor-
tion,

Plaintiff in Error,

vs.

WILLIAM A. HANSFORD,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

FILED

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Records of U. S. Circuit
Court of appeals
854



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STONE-ORDEAN-WELLS COMPANY, a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

Messrs. NICHOLS & WILSON, of Billings, Montana,

Attorneys for Plaintiff and Defendant in Error.

J. H. JOHNSTON, Esq., of Billings, Montana,

GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant and Plaintiff in Error. [1*]

*In the District Court of the United States in and for
the District of Montana.*

No. 290.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED that on the 18th day of November, 1912, Transcript on Removal from the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, was duly filed herein, in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Record.

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Complaint.

Comes now the plaintiff, and, stating his cause of action against the defendant herein, complains and alleges:

1. That the defendant is a corporation, engaged in the wholesale grocery business, and having its principal place of business in the State of Montana, in the city of Billings.

2. That the plaintiff entered into the service of the defendant as a laborer in its wholesale house in the city of Billings, Montana, on the 1st day of June, 1912, and remained continuously in its service until the 22d day of June, 1912.

3. That as such employee, the plaintiff was engaged in receiving and distributing goods and in assembling goods for shipment upon the first floor of defendant's warehouse in said city of Billings.

4. That during the time plaintiff was in defendant's employ and at the time of the accident and injury herein complained of, the said defendant had

constructed and maintained upon the first floor of its said warehouse a platform or staging about thirty feet long by twenty feet wide, which was reached by an upright ladder from the main floor, and which was used and intended for use in the storage of goods. That said platform and staging was about nine feet above the floor; and was supported by upright pillars ten by twelve inches in size, set about ten feet apart, and was constructed of common pine lumber or boards one inch thick and twelve inches wide, laid on two by four inch joists or stringers, and said platform was without railing of any kind about the outside thereof. That at the outer edge of said platform, the defendant had placed a board about ten feet in length and of the same kind and dimension as those used [3] in the floor of said platform, which was without support of any kind except at either end, where it rested upon one-inch cleats fastened to the upright posts supporting said platform, as above mentioned.

5. That upon the 21st day of June, 1912, while the plaintiff was yet in defendant's employ, he received an order which required the assembling for shipment, among other things, of several large crated coffee cans, which coffee cans at the time were located upon the above-described platform; that plaintiff was thereupon requested to go upon said platform and hand down the requisite number of said cans to another employee stationed upon the floor to receive them; that plaintiff in pursuance of such direction went upon said platform, and, while handing one of said cans down to his fellow employee, stepped upon

the board located at the edge of said platform, as herein described, and thereupon said board broke, precipitating the plaintiff to the floor below; that plaintiff fell upon his right elbow and chest, and thereby received serious and permanent injuries, as hereinafter alleged.

6. Plaintiff alleges that the defendant was negligent in the construction and maintenance of said platform in that it had failed to provide or have any railing along the outer edge of said platform, and had failed to provide sufficient support under the board which extended beyond the edge of said platform and upon which plaintiff stepped, as alleged, and the breaking of which caused plaintiff to fall and receive the injuries as alleged.

7. That the negligence of the defendant in its failure to provide a suitable railing along the outside edge of said platform and in its failure to provide sufficient supports under the said board caused the plaintiff to fall and to receive the injuries as alleged.

8. That the plaintiff was at all times in the exercise of due care and caution, and he alleges that the injuries complained of were wholly due to the negligence of the defendant, as alleged.

9. That by the fall aforesaid, both bones of the plaintiff's right forearm were broken, his right elbow joint was dislocated and [4] his chest crushed and injured. That the injuries aforesaid caused plaintiff much physical suffering and mental anguish, and will continue so to do, and plaintiff alleges that the said injuries are permanent in character.

10. That the injury to plaintiff's arm is of such a character as to now require a surgical operation, and will further occasion plaintiff much physical suffering and expense.

11. That plaintiff has not since said injury been able to do any manual labor, and has now, and will during the remainder of his life, have but a limited and partial use of his said arm, and his ability to perform manual labor is now permanently impaired. That prior to said injury, plaintiff was physically strong, and was able to earn wages in the sum of Seventy-five Dollars (\$75.00) per month.

12. That the plaintiff, on account of the injuries aforesaid, has incurred, and will hereafter incur, a liability for the service of a surgeon in the sum of Two Hundred Seventy-five Dollars (\$275.00), hospital fees, nurse hire and medicines in the sum of Two Hundred Twenty-five Dollars (225.00).

13. That the plaintiff has been damaged by reason of the alleged negligence of the defendant, as follows:

In the expense for surgical aid, medicines	
and hospital care and attention.....	\$500.00
In the loss of time and ability to earn wages	
from the date of said injury to the com-	
mencement of this action in the sum of..	\$225.00
In the loss of future earnings, and for his	
physical and mental pain and anguish	
already endured, and which he will	
endure in the future	\$25,000.00

14. That no part of plaintiff's said claim for dam-

ages against the defendant has been paid, and plaintiff is now the owner of said claim.

Wherefore, plaintiff prays judgment against the defendant in the sum of Twenty-five Thousand Seven Hundred Twenty-five Dollars [5] (\$25,725.00), and for his costs and disbursements herein.

NICHOLS & WILSON,
Attorneys for Plaintiff.

State of Montana,
County of Yellowstone,—ss.

William A. Hansford, being first duly sworn, on oath states:

That he is the plaintiff named in the foregoing complaint; that he has read the said complaint and knows its contents, and that each of the statements therein contained are true of his personal knowledge.

WILLIAM A. HANSFORD.

Subscribed and sworn to before me this 23d day of September, 1912.

[NS.]

B. F. HARRIS,
Notary Public for the State of Montana, Residing at
Billings, Montana.

My commission expires Dec. 23d, 1913.

Filed Sept. 28, 1912. [6]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY,
a Corporation,

Defendant.

Summons.

The State of Montana Sends Greeting to the Above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS my hand and the seal of said court this 28th day of September, 1912.

[Court Seal]

LORIN T. JONES,

Clerk.

By Fred P. Rixon,

Deputy Clerk.

Sheriff's Office,
 State of Montana,
 County of Yellowstone,—ss.

I hereby certify that I received the within summons and a copy of the complaint in said action on the 28th day of September, A. D. 1912, and personally served the same on the 28th day of September, A. D. 1912, on T. J. McDonough, as manager of Stone-Ordean-Wells Company, a corporation, being the defendant named in said summons, by delivering to and leaving with said defendant, personally, in the county of Yellowstone, State of Montana, a copy of said summons and of said complaint.

Dated at Billings, Montana, this 28th day of September, A. D. 1912.

J. C. ORRICK,
 Sheriff.

By E. S. Judd,
 Deputy Sheriff.

SHERIFF'S FEES.

Total sheriff's fees	\$1.20
Mileage	\$.20
Copies	\$
<hr/>	
Service	\$1.00

Returned and filed this 28th day of September, A. D. 1912. Lorin T. Jones, Clerk. By Fred P. Rixon, Deputy Clerk. [7]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

VS.

STONE-ORDEAN-WELLS COMPANY,
a Corporation,

Defendant.

**Stipulation [Extending Defendant's Time to
Appear, etc.].**

The above-named plaintiff hereby stipulates and agrees that the above-named defendant may have until the 28th day of October, 1912, inclusive, within which to appear in the above-entitled action and within which to demur, answer or plead to the complaint of the plaintiff filed in said action.

October 17, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1912. [8]

[Title of Court and Cause.]

Demurrer.

Comes now the above-named defendant and demurs to the complaint of the plaintiff on file herein, upon the ground and for the reason that said com-

plaint does not state facts sufficient to constitute a cause of action.

J. H. JOHNSTON,
Attorney for Defendant.

Due service of the within Demurrer and receipt of copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

Filed October 26, 1912. [9]

[Title of Court and Cause.]

**Notice That Petition for Removal and Bond will be
Filed.**

To William A. Hansford, the Above-named Plaintiff, and Nichols & Wilson, His Attorneys:

You and each of you will please take notice, that the above-named defendant will this day file in the above-named court, in the above-entitled action, a petition and bond for the removal of the above-entitled action from the above-named court to the District Court of the United States in and for the District of Montana.

A true copy of said petition and bond are herewith served upon you, and made a part of this notice.

Signed and dated October 26, 1912.

J. H. JOHNSTON,
Attorney for Defendant and Petitioner. [10]

[Title of Court and Cause.]

**Petition for Removal to the District Court of the
United States for the District of Montana.**

Your petitioner, Stone-Ordean-Wells Company, a corporation, respectfully shows this Honorable Court:

That it is the defendant in this suit, which is of a civil nature, at law, and that the matter and amount in dispute in this cause exceeds the sum and value of three thousand dollars, exclusive of interest and costs, and that the amount prayed for in the complaint herein is the sum of twenty-five thousand seven hundred twenty-five and no-100 dollars.

That the controversy herein is between citizens of different States; that the plaintiff, William A. Hansford, was at the time of the commencement of this action and still is a citizen of the State of Montana, residing at Billings, Yellowstone County, Montana, and that your petitioner, Stone-Ordean-Wells Company, a corporation, was at the time of the commencement of this action, and still is a corporation, organized, existing and doing business under and by virtue of the laws of Maine, and a citizen and resident of the State of Maine, and is not now, and at the commencement of this action was not, a citizen or resident of the State of Montana; and that your petitioner desires to remove this suit before the trial thereof into the District Court of the United States, in and for the District of Montana.

That your petitioner offers herewith a bond with good and sufficient sureties, for its entering in the

District Court of the United States for the District of Montana, within thirty days from the date of filing this petition, a certified copy of the record in this action and for paying all costs that may be awarded by the said District Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

That your petitioner therefore prays that the said surety and [11] bond may be accepted, that this suit may be removed into the District Court of the United States in and for the District of Montana, pursuant to the statutes of the United States, in such case made and provided; and that no other proceedings may be had herein in this court.

And thus will your petitioner ever pray.

STONE-ORDEAN-WELLS COMPANY.

By W. L. MACKAY,

Its Asst. Treasurer,

Petitioner and said Defendant.

J. H. JOHNSTON,

Attorney for Petitioner and Defendant.

State of Montana,

County of Yellowstone,—ss.

W. L. Mackay, being first duly sworn, deposes and says: That he is an officer, to wit, Assistant Treasurer of Stone-Ordean-Wells Company, the corporation named as defendant in the above-entitled action and petitioner above named; that as such officer of said corporation he makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof,

and that the matters and things therein stated are true of his own knowledge.

W. L. MACKAY.

Subscribed and sworn to before me this 25th day of October, 1912.

[Seal]

J. H. JOHNSTON,

Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914. [12]

[Title of Court and Cause.]

**Bond on Removal to the District Court of the
United States for the District of Montana.**

Know all men by these presents, That we, Stone-Ordean-Wells Company, a Maine corporation, defendant herein, as principals, and W. H. Donovan and L. H. Drake, Jr., of Billings, Montana, as sureties, are held and firmly bound unto William A. Hansford, plaintiff herein, in the penal sum of Two Hundred Dollars, for the payment of which, well and truly to be made unto the said William A. Hansford, his heirs, personal representatives, and assigns, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that, whereas, the said Stone-Ordean-Wells Company has filed its petition in the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, for the removal of a certain cause therein pending, wherein the said Will-

iam A. Hansford is plaintiff, and the said Stone-Ordean-Wells Company, a corporation, is defendant, and the District Court of the United States in and for the District of Montana.

Now, if the said Stone-Ordean-Wells Company shall enter in the said District Court of the United States within thirty days from the date of filing the said petition herein a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, said Stone-Ordean-Wells Company has caused its corporate name to be hereunto subscribed by its assistant Treasurer, and the said W. H. Donovan and L. H. Drake, Jr., sureties, [13] have hereunto set their hands and seals this 26th day of October, 1912.

STONE-ORDEAN-WELLS COMPANY.

By W. L. MACKAY,

Its Asst. Treasurer,

W. H. DONOVAN. [Seal]

L. H. DRAKE, Jr. [Seal]

State of Montana,

County of Yellowstone,—ss.

W. H. Donovan and L. H. Drake, Jr., being first duly sworn, each for himself deposes and says: That he is a citizen and resident of Billings, Yellowstone County, Montana; that he is a freeholder in said county and is worth the sum of Two Hundred Dol-

lars over and above all just debts and liabilities, and over and above all property exempt from sale on execution.

W. H. DONOVAN.

L. H. DRAKE, Jr.

Subscribed and sworn to before me this 26th day of October, 1912.

[Seal]

J. H. JOHNSTON,

Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

The foregoing undertaking and the sureties thereof are hereby approved this day of October, 1912.

.....,

Judge of said District Court.

Due service of the within notice and receipt of a copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,

Attorneys for Plaintiff.

Filed October 26, 1912. [14]

[Title of Court and Cause.]

Petition for Removal to the District Court of the United States for the District of Montana.

Your petitioner, Stone-Ordean-Wells Company, a corporation respectfully shows this Honorable Court:

That it is the defendant in this suit, which is of a civil nature, at law, and that the matter and amount

in dispute in this cause exceeds the sum and value of three thousand dollars, exclusive of interest and costs, and that the amount prayed for in the complaint herein is the sum of twenty-five thousand seven hundred twenty-five and no-100 dollars.

That the controversy herein is between citizens of different states; that the plaintiff, William A. Hansford, was at the time of the commencement of this action and still is a citizen of the State of Montana, residing at Billings, Yellowstone County, Montana, and that your petitioner Stone-Ordean-Wells Company, a corporation, was at the time of the commencement of this action, and still is, a corporation, organized, existing and doing business under and by virtue of the laws of Maine, and a citizen and resident of the State of Maine, and is not now, and at the commencement of this action was not, a citizen or resident of the State of Montana; and that your petitioner desires to remove this suit before the trial thereof into the District Court of the United States, in and for the District of Montana.

That your petitioner offers herewith a bond with good and sufficient sureties, for its entering in the District Court of the United States for the District of Montana, within thirty days from the date of filing this petition, a certified copy of the record in this action and for paying all costs that may be awarded by the said District Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

That your petitioner therefore prays that the said surety and bond may be accepted, that this suit

may be removed into the [15] District Court of the United States in and for the District of Montana, pursuant to the statutes of the United States, in such case made and provided; and that no other proceedings may be had herein in this court.

And thus will your petitioner ever pray.

STONE-ORDEAN-WELLS COMPANY.

By W. L. MACKAY,

Its Asst. Treasurer,

Petitioner and Said Defendant.

J. H. JOHNSTON,

Attorney for Petitioner and Defendant.

State of Montana,

County of Yellowstone,—ss.

W. L. Mackay, being first duly sworn, deposes and says: That he is an officer, to wit, Assistant Treasurer of Stone-Ordean-Wells Company, the corporation named as defendant in the above-entitled action and petitioner above named; that as such officer of said corporation he makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge.

W. L. MACKAY.

Subscribed and sworn to before me this 25th day of October, 1912.

[Seal]

J. H. JOHNSTON,

Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

Due service of the within petition and receipt of a copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,
Attorneys for Plaintiff.

Filed Oct. 26, 1912. [16]

[Title of Court and Cause.]

**Bond on Removal to the District Court of the United
States for the District of Montana.**

Know all men by these presents, That we, Stone-Ordean-Wells Company, a Maine corporation, defendant herein, as principal, and W. H. Donovan and L. H. Drake, Jr., of Billings, Montana, as sureties, are held and firmly bound unto William A. Hansford, plaintiff herein, in the penal sum of Two Hundred Dollars, for the payment of which, well and truly to be made unto the said William A. Hansford, his heirs, personal representatives, and assigns, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that, whereas, the said Stone-Ordean-Wells Company has filed its petition in the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, for the removal of a certain cause therein pending, wherein the said William A. Hansford is plaintiff, and the said Stone-Ordean-Wells Company, a corporation, is defendant,

to the District Court of the United States in and for the District of Montana.

Now, if the said Stone-Ordean-Wells Company shall enter in the said District Court of the United States within thirty days from the date of filing the said petition herein a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, said Stone-Ordean-Wells Company has caused its corporate name to be hereunto subscribed by its assistant Treasurer, and the said W. H. Donovan and L. H. Drake, Jr., sureties, have hereunto set their hands and seals this 26th day [17] of October, 1912.

STONE-ORDEAN-WELLS COMPANY.

By W. L. MACKAY,

Its Asst. Treasurer,

W. H. DONOVAN. [Seal]

L. H. DRAKE, Jr. [Seal]

State of Montana,

County of Yellowstone,—ss.

W. H. Donovan and L. H. Drake, Jr., being first duly sworn, each for himself deposes and says: That he is a citizen and resident of Billings, Yellowstone County, Montana; that he is a freeholder in said county and is worth the sum of Two Hundred Dollars over and above all just debts and liabilities,

and over and above all property exempt from sale on execution.

W. H. DONOVAN.

L. H. DRAKE, Jr.

Subscribed and sworn to before me this 26th day of October, 1912.

[Seal]

J. H. JOHNSTON,

Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

The foregoing undertaking and the sureties thereof are hereby approved this 26th day of October, 1912.

GEO. W. PIERSON,

Judge of said District Court.

Due service of the within bond and receipt of a copy of same acknowledged this 26th day of October, 1912.

NICHOLS & WILSON,

Attorneys for Plaintiff.

Filed October 26, 1912. [18]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Order of Removal.

The defendant herein having within the time provided by law filed its petition for removal of the cause to the District Court of the United States, in and for the District of Montana, and having at the same time offered and filed in said action its bond in the sum of two hundred dollars, with W. H. Donovan and L. H. Drake, good and sufficient sureties, pursuant to statute and conditioned according to law; now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that this cause and action be and the same hereby is removed for trial to the District Court of the United States, in and for the State of Montana,, pursuant to the statute of the United States, and the Clerk of this Court is hereby authorized, ordered and directed to furnish the petitioner, defendant Stone-Ordean-Wells Company, herein, a duly certified copy of the record in this cause, upon the payment of the legal and customary fees for preparing said record. And this Court will proceed no further in said action unless the same shall be remanded from said District Court of the United States.

Done in open court this twenty-eighth day of October, 1912.

GEO. W. PIERSON,
Judge.

Filed Oct. 28, 1912. [19]

[Certificate of Clerk to Record on Removal.]

In the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

State of Montana,

County of Yellowstone,—ss.

I, Lorin T. Jones, Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, do hereby certify that the hereunto annexed papers are full, true and correct copies of the complaint, summons, return on summons, stipulation, demurrer, petition for removal, bond on removal, notice of said petition and bond for removal, and order of removal in the above entitled action, and that said papers constitute the entire record in said cause.

Witness my hand and the seal of my office this 15th day of November, 1912.

[Seal]

LORIN T. JONES,

Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

[Endorsed]: Title of Court and Cause. Transcript on Removal. Filed Nov. 18, 1912. Geo. W. Sproule, Clerk. [20]

Thereafter, on January 21, 1913, Answer was duly filed herein, as follows, to wit: [21]

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Answer.

Comes now the above-named defendant, and for answer to the complaint of plaintiff filed herein:

1.

Admits the allegations of paragraphs 1, 2, and 3 of said complaint.

2.

Admits the allegations of paragraph 4 of said complaint, except that defendant denies that the platform mentioned in said paragraph was nine feet above the floor or at any greater height from said floor than eight feet; except also that defendant denies that the boards of which said platform was constructed were of uniform width; and defendant alleges that said boards were of various widths from six inches to twelve inches; and except also that defendant denies that defendant had placed a board at the outer edge of said platform, or that the board referred to was only 10 feet long or of the same dimensions as those used in the floor of said platform. Defendant alleges the truth to be that

said board was not a part of said platform, that it was separate therefrom and from three and one-half inches to four inches below said platform; that said board was eleven feet long, about ten inches wide, and placed at right angle to the boards in the floor of said platform.

3.

Denies any knowledge or information sufficient to form [22] a belief as to each or any of the allegations of paragraph 5 of said complaint, except that defendant admits that on the 21st day of June, 1912, while plaintiff was in the employ of defendant, plaintiff went upon said platform to assist another employee in getting certain empty coffee cans, which were crated, from said platform to said first floor, and that while so employed plaintiff fell from said platform to said floor.

4.

Denies each and every allegation of paragraph 6 of said complaint, except that defendant admits that there was no railing along the outer edge of said platform. And defendant alleges that said board was not intended, or placed there, to be stepped, stood or walked upon by any person, as was patent and plainly apparent from the position it occupied and the manner in which it was fastened up; and all of which plaintiff well knew or would have known had he exercised due or reasonable care or diligence or caution, or any care, diligence, or caution whatsoever or at all.

5.

Denies each and all of the allegations of paragraphs 7, 8 and 13 of said complaint.

6.

Denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 9, 10, 11, and 12 of said complaint or as to any of the allegations of any of said paragraphs, 9, 10, 11, and 12.

7.

Admits that the claim for damages set out in said complaint has not been paid, but as to the allegation that plaintiff is now the owner of said claim, defendant denies any knowledge or information thereof sufficient to form a belief.

8.

Further answering and for a first separate defense [23] to the cause of action in said complaint set forth, defendant alleges that each and all of the injuries to plaintiff set forth and alleged in said complaint were due to and occasioned by causes, the risk of injury from which said plaintiff, William A. Hansford, had assumed.

9.

Further answering and for a second separate defense to the cause of action set forth in said complaint, the defendant alleges that each and all of the injuries to said plaintiff set out and alleged in said complaint were due to and caused by his own, said William A. Hansford's, contributing fault and carelessness.

10.

Save as in this answer above specifically admitted or denied, defendant generally denies each and every

allegation and all of the allegations of plaintiff's said complaint.

WHEREFORE, having fully answered, defendant prays judgment for its costs of suit herein.

J. H. JOHNSTON,
Attorney for Defendant.

State of Montana,
County of Yellowstone,—ss.

J. H. Johnston, being first duly sworn, on oath says: That he is the attorney for the defendant named in the foregoing answer, and resides in said Yellowstone County; that said defendant is a corporation, and there is no officer of said defendant corporation within said Yellowstone County, where this affiant resides and this verification is made, and for that reason he makes this verification on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that said answer and the matters and things therein stated are true to the best of his knowledge, information and belief.

J. H. JOHNSTON.

Subscribed and sworn to before me this 20th day of January, 1913.

[Seal] JAS. R. GOSS,
Notary Public for the State of Montana, Residing at
Billings, Montana.

My commission expires January 30th, 1915. [24]

Due service of the within answer and receipt of a copy of same acknowledged this 20th day of January, 1913.

NICHOLS & WILSON,
Attorneys for Plff.

[Endorsed]: Title of Court and Cause. Answer.
Filed Jan. 21, 1913. Geo. W. Sproule, Clerk. [25]

Thereafter, on January 29, 1913, an Amended Answer was duly filed herein, in the words and figures following, to wit: [26]

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY,
a Corporation,

Defendant.

Amended Answer.

Comes now the above-named defendant, and for amended answer to the complaint of plaintiff filed herein:

1.

Admits the allegations of paragraphs 1, 2, and 3 of said complaint.

2.

Admits the allegations of paragraph 4 of said complaint, except that defendant denies that the platform mentioned in said paragraph was nine feet above the floor or at any greater height from said floor than eight feet; except, also, that defendant denies that the boards of which said platform was constructed were of uniform width; and defendant alleges that said boards were of various widths from six inches to twelve inches; and except, also, that defend-

ant denies that defendant had placed a board at the outer edge of said platform, or that the board referred to was only 10 feet long or of the same dimensions as those used in the floor of said platform. Defendant alleges the truth to be that said board was not a part of said platform, that it was separate therefrom and from three and one-half inches to four inches below said platform; that said board was eleven feet long, about ten inches wide, and placed at right angle to the boards in the floor of said platform.

3.

Denies any knowledge or information sufficient to form a belief as to the allegations, or any of the allegations of paragraph 5 of said complaint, except that the defendant admits that on the [27] 21st day of June, 1912, while plaintiff was in the employ of defendant, plaintiff went upon said platform to assist another employee in getting certain empty coffee cans, which were crated, from said platform to said first floor, and that while so employed plaintiff fell from said platform to said floor.

4.

Denies each and every allegation of paragraph 6 of said complaint, except that defendant admits that there was no railing along the outer edge of said platform. And defendant alleges that said board was not intended, or placed there, to be stepped, stood or walked upon by any person, as was patent and plainly apparent from the position it occupies and the manner in which it was fastened up; and all of which the plaintiff well knew, or would have known had he

exercised due or reasonable care or diligence or caution, or any care, diligence, or caution whatsoever or at all.

5.

Denies each and all of the allegations of paragraph 7, 8, and 13 of said complaint.

6.

Denies any knowledge or information sufficient to form a belief as to the allegations, or any of the allegations, of paragraphs 9, 10, 11, and 12 of said complaint.

7.

Admits that the claim for damages set out in said complaint has not been paid, but as to the allegation that plaintiff is now the owner of said claim, defendant denies any knowledge or information thereof sufficient to form a belief.

8.

Save as in this answer above specifically admitted or denied, defendant generally denies each and every allegation and all of the allegations of plaintiff's said complaint.

9.

Further answering and for a first separate defense to the cause of action set out in plaintiff's said complaint, the defendant alleges that each and all of the injuries to said plaintiff set out in said [28] complaint were approximately due to and caused plaintiff's own fault and carelessness, in the following particulars:

That the said board upon which, plaintiff alleges, he stepped and the breaking of which caused his fall

and injuries, was not a part of said platform, and was not intended, or placed there, to be stepped, stood, or walked upon, as was patent and plainly apparent from the position it occupied, the manner in which it was fastened up, and its lack of support; that it was placed there and maintained solely for use as a shelf for the holding of light articles only; that it was not necessary for plaintiff to hand down said coffee can nor to step upon said board in handing it down; that there were other ways or methods of taking or transferring said cans down from said platform to said first floor, which were safe or less dangerous than the way and method selected and used by plaintiff; all of which facts in this paragraph above alleged plaintiff knew, or by the exercise of reasonable or ordinary care or caution would have known. Plaintiff voluntarily chose the method and way in which to take or pass said coffee can down from said platform; a way and method which was dangerous and apparently so. That he knew, or by the exercise of reasonable or ordinary care or caution would have known, that said board would not support his weight; that it was not safe for him to step on it; and that he would be liable to receive a fall and injuries if he stepped thereon. Plaintiff was careless and negligent in choosing the way and method of taking or transferring said can from said platform to said first floor, in handing said can down, and in stepping upon said board, if he did step thereon.

10.

Further answering and for a second separate de-

fense to the cause of action set out in plaintiff's said complaint, the defendant alleges that each and all of the injuries to the plaintiff set out and alleged in said complaint were proximately due to and occasioned by causes, the risk of injury from which said plaintiff had assumed, in this:

1. That plaintiff knew, or by the exercise of reasonable or ordinary care and caution would have known, that said board was a [29] shelf intended to hold light articles only; and not intended to be stepped upon; that said board would not hold his weight, and that if he stepped upon it said board was likely to break and cause him to fall to the floor and be injured thereby; that said board was supported only by being nailed to cleats at each end thereof; that it was not necessary for him to step upon said board in handing said can down, nor to hand said can down, but that there were other and less dangerous, or perfectly safe, methods and ways of transferring said can from the platform to the floor, but nevertheless with such knowledge and appreciation of the risk he stepped upon said board, if he did step upon said board as alleged in said complaint.

2. That said board was intended by defendant to be used solely as a shelf and to hold light articles only, and was not intended by defendant to be stepped, stood or walked upon by any person, and if plaintiff stepped upon same, as alleged in said complaint, he did so without any necessity therefor.

3. That there was no fault, negligence, or carelessness on defendant's part in maintaining said platform without a railing around the outer edge

thereof, or in maintaining said board without other or additional support, in the place it was maintained; and that plaintiff's alleged injuries and loss suffered therefrom, if any, were suffered by him solely in consequence of the ordinary risks of the business in which he was then employed.

WHEREFORE, having fully answered, defendant prays judgment for its costs of suit herein.

J. H. JOHNSTON,
Attorney for Defendant.

State of Montana,
County of Yellowstone,—ss.

J. H. Johnston, being first duly sworn, on oath says: That he is the attorney for the defendant named in the foregoing answer, and resides in said Yellowstone County; that said defendant is a corporation, and there is no officer of said defendant corporation [30] within said Yellowstone County, where this affiant resides and this verification is made; and for that reason he makes this verification on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that said answer and the matters and things therein stated are true to the best of his knowledge, information and belief.

J. H. JOHNSTON.

Subscribed and sworn to before me this 28th day of January, 1913.

[Seal]

JAS. R. GOSS,
Notary Public in and for the State of Montana, Residing at Billings.

My commission expires Jan. 30, 1915.

[Endorsed]: Title of Court and Cause. Amended Answer. Filed January 29, 1913. Geo. W. Sproule, Clerk. [31]

Thereafter, on February 6, 1913, Reply to Amended Answer was duly filed herein, in the words and figures following, to wit: [32]

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Reply to Answer and Amended Answer.

Comes now the plaintiff in the above-entitled cause and replying to the averments of the answer and amended answer herein states:

I.

That he denies each and every averment contained in paragraphs 8 and 9 of the said answer.

II.

That he specifically denies each and every averment contained in paragraph 9 and paragraph 10 of the amended answer herein, the same being the first and second separate defenses respectively, pleaded by the defendant.

WHEREFORE, plaintiff prays as in his complaint.

NICHOLS & WILSON,
Attorneys for Plaintiff.

State of Montana,
County of Yellowstone;—ss.

William A. Hansford, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has heard the foregoing reply read and knows its contents, and that each of the statements therein contained is true of his personal knowledge.

.....,

Subscribed in my presence and sworn to before me by the said [33] William A. Hansford, this day of February, 1913.

.....,

Notary Public for the State of Montana, Residing at
Billings, Montana.

My Commission expires November 2, 1913.

[Endorsed]: Title of Court and Cause. Reply.
Filed Feb. 6th, 1913. Geo. W. Sproule, Clerk. [34]

Thereafter, on June 6, 1913, the Verdict of the Jury was duly filed and entered herein, in the words and figures following, to wit: [35]

*In the District Court of the United States, District
of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Cor-
poration,

Defendant.

Verdict.

We, the jury, find for the plaintiff, and we assess
his recovery in the sum of Five Thousand (\$5,000)
dollars.

R. E. STONER,

Foreman.

[Endorsed]: Title of Court and Cause. Verdict.
Filed June 6, 1913. Geo. W. Sproule, Clerk. [36]

Thereafter, on June 11, 1913, Judgment was duly
entered herein, in the words and figures following, to
wit: [37]

*In the District Court of the United States, District
of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Cor-
poration,

Defendant.

Judgment on Verdict.

Be it remembered that this action came on regularly for trial, the parties hereto appearing by their respective attorneys, plaintiff by Nichols & Wilson, and the defendant by Gunn, Rasch & Hall and J. H. Johnston. A jury was regularly impaneled and sworn to try said action. Thereupon witnesses upon the part of the respective parties were sworn and examined, and, after hearing the evidence, the arguments of counsel and the instructions of the Court, the jury retired to deliberate of their verdict, and subsequently returned into Court with a verdict duly signed by their foreman, by which the issues of said cause were found for the plaintiff, and his recovery was assessed in the sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is now hereby ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant the sum of Five Thousand (\$5,000.00) Dollars, with interest thereon at eight (8%) per cent from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action taxed in the sum of Forty-three 60/100 Dollars.

Entered June 11, 1913.

GEO. W. SPROULE,

Clerk. [38]

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States

District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

WITNESS my hand and the seal of said Court at Billings, Montana, this 11th day of June, A. D., 1913.

GEO. W. SPROULE,

Clerk.

[Endorsed]: Title of Court and Cause. Judgment-roll. Filed and entered June 11, 1913. Geo. W. Sproule, Clerk. [39]

Thereafter, on September 25, 1913, defendant's Bill of Exceptions was duly settled and allowed and filed herein, being in the words and figures following, to wit: [40]

*In the District Court of the United States, in and for
the District of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial in said court on the 5th day of June, 1913, before the Honorable George M. Bourquin, the Judge of said Court, and a jury duly impaneled to try said cause, Messrs. Nichols & Wilson appearing as counsel for the plaintiff, and

(Testimony of William A. Hansford.)

Messrs. J. H. Johnston and Gunn, Rasch & Hall, appearing as counsel for the defendant.

And thereupon the following proceedings were had:

[Testimony of William A. Hansford, the Plaintiff, in His Own Behalf.]

WILLIAM A. HANSFORD, called and sworn to testify as a witness in his own behalf, testified as follows:

Direct Examination.

My name is William A. Hansford. I live at Billings and have lived here about three years. Before coming to Billings I resided at Park City, Montana. I am thirty years old, married and have a family. My business is manual labor and have worked in various lines. I worked for a lumber company here in Billings and worked for Stone-Ordean-Wells Company. While living at Park City my business was plaster and lather. I entered the employ of the Stone-Ordean-Wells Company on June 1, 1912, and was employed in shipping goods, and receiving goods and getting [41] them ready for shipment. When any goods came in and went on my floor I had to stack them up in an orderly manner. If there were orders to go out I had to wheel them out on the platform. I had no special place to work in their building. It was understood that I should do most of my work on the first floor. The building was located on 5th Avenue and 25th Street. There were three floors in the building and the person in charge of my floor, supervising the work was Mr. Russell. He was

(Testimony of William A. Hansford.)

shipping clerk and I always worked under him as foreman. He gave me the orders to do the things which I did. I did some things Mr. McDonough told me to do; he was the manager. I did work on other floors at the direction of Mr. Russell and Mr. McDonough. I ceased my employ on the 21st day of June, 1912. With reference to the first floor, the goods that were received into the building were placed in various places in the building. There were certain places to put the sugar, certain place to put the salt and a certain place to put tobacco. There was a platform on this first floor raised above the floor itself. It was in the northwest corner and was possibly thirty feet one way and twenty the other. It was about eight or nine feet above the floor, was used for the storing of merchandise on it, spices, clothespins, lamp chimneys and lantern globes. The means of access to the platform was a ladder located on the east end of the platform. The model before us here looks similar to the one in the building, except the ladder there was perpendicular.

On the day in question I had an order which called for empty coffee cans and it was about three o'clock when we were filling this order. Mr. Russell was with me at the time. I had a conversation with Mr. Russell with reference to this part of the order; there was something said about it. There was something said about the weight of the cans. I believe that I said they would not weigh one hundred pounds, and Mr. Russell said we would ship them anyhow. That

(Testimony of William A. Hansford.)

is about as near the [42*—2†] conversation as I can remember. Mr. Russell told me to go up and get them down. These coffee cans were on this platform. I had been on this platform before, possibly fifteen or twenty times. I had not had occasion before this time to go up to hand anything down to anyone. As to how I would get down the goods which I had previously gotten up there, if light stuff, carry them down the ladder. Other times somebody would catch them below, pitch them down. As to the character of the goods on this platform, compared to the other goods, they were small packages and light, most of it. The empty coffee can which you hold in your hand is such a package as I have reference to. It would be a fair representation. The weight of those cans is about fifteen pounds, I believe. If I remember right, there were six of them to be secured in filling that order that day. In response to Mr. Russell's directions, I went up and started to hand down and give the cans to Mr. Russell. I went up this ladder. As to what I did in handing down the cans to Mr. Russell, I just simply took hold of the top, stoop over and handed them over the edge to Mr. Russell and he would take them from me, take them with both hands. I would say that these cans were located about three or four feet back on the platform from the edge of it. Mr. Russell was on the floor below, just at the edge of the platform about one-third of the way from the post.

*Page-number of Original Certified Transcript of Record.

†Original page-number of Bill of Exceptions as same appears in Original Certified Transcript of Record.

(Testimony of William A. Hansford.)

He was standing in front of the platform, to the center of the platform between these two posts (referring to model of platform). After I took hold of this can, I went to the edge of the platform with it, leaned over, and handed it over to Mr. Russell. I could not tell you how far down I would lean. I could not say for sure how many of these cans I actually did hand to Mr. Russell; my best recollection is two or three. Assuming that I had handed down two of them, when I handed or attempted to hand down the third can I lit on the floor; the board broke. I fell on my right side, at Mr. Russell's feet, right at his [43—3] feet. With reference to the broken board, five—four or five—possibly six feet from this post here (indicating post on model). I was not unconscious, I noticed the board hanging there. When I observed the broken board it was not detached entirely from the platform; it was hanging to the cleats at either end.

After I fell, they got me some water and gave me a drink, put my arm in a sling, a sugar sack, and helped me on my feet. I went to the office of Dr. Walters and found that my right elbow was broken. My chest was also injured and that is all that I know of. Dr. Walters called in another doctor and put my arm in a sling. Wrapped it up and put it in a sling; put on splints. I was suffering the greatest kind of pains at that time, as severe as it possibly could be. I was under the care and treatment of Dr. Walters practically two months, I guess. My arm was put in a partial cast, and after my arm was taken

(Testimony of William A. Hansford.)

from this cast I could not use it at all. I had no motion in the arm at the elbow, and the condition of the wrist was weak,—dropped down like that (illustrating). I had no rotary motion of the arm at that time. The character of the other injuries that I spoke of, my chest was all black and blue and sore. There were no broken bones that I know of. My chest remained in that condition may be for a month or two. Once in a while it hurts me still if I cough violently or sneeze or anything like that.

After Dr. Walters had treated me for this length of time I went for treatment to Doctors Rieger & Rieger, osteopaths. Dr. Walters told me to massage the arm, and I had the osteopaths do that. I must have been under their treatment a month. I was not able to secure any motion, any movement in the elbow at that time. Dr. Movius also treated my arm and performed an operation upon it. I had the bones wired together, and several other things done to it; I don't know exactly. That was in October. The result of this operation gave me motion, rotary [44—4] motion, this way (indicating). There is a slight movement now in the elbow joint—this much (witness exhibiting the injured arm to the jury). It had not yet fully healed up. I have continuous pain since it was first treated by Dr. Walters up to the present time. It pains me all the time. I am able to use it just from the shoulder. I can do very little with it, if anything. As to what I had tried to do with it, I have worked in a drug-store a short while. I am not able to lift anything with any weight, not

(Testimony of William A. Hansford.)

to hold it out. I can lift a weight straight out, possibly forty or fifty pounds. I was right-handed and as to whether I am able to use my arm in writing, I can use it a very little by getting the proper position. I still have the use of my fingers but I am not able to feed myself at all with that hand.

Q. Referring again, Mr. Hansford, to the platform and a matter to which I intended to call your attention: You had been working about this place for about three weeks, as I understand you?

A. Yes, sir.

Q. Did you, prior to the day that you went upon the platform, had you observed that there was a board as indicated here (referring to model) which was not a part of the platform itself? A. I had not.

Q. Had you observed that there was a board, or a part of the platform which was only supported by a couple of little cleats at either end? A. I had not.

Q. As you were working about on the platform—on the floor below, had you observed that there was a board at the edge of the platform which was not in fact a continuation of the platform?

A. I never had. [45—5]

Q. What appearance, if any, as you recollect, did this platform give—that is to say, was there any indication that there was any portion of it there which wasn't in fact a part of the platform?

A. I never noticed it.

Q. Now, as you went upon the platform that day and as you turned to take these cans and leaned over to hand them down to Russell, did you at that time

(Testimony of William A. Hansford.)

observe that there was a board at the edge of the platform which was not a part of the platform?

A. I did not.

Q. And had you, in handing down the previous cans, observed that you had stepped upon a board which was not in fact a part of the platform?

A. I had not.

Q. Had anybody said anything to you with reference to this platform or this board, about the building there? A. No, sir.

Q. Either Mr. Russell or anybody else?

A. No, sir.

Q. Who had anything to do with the business or in fact had anybody ever called your attention to it?

A. No, sir.

While I was working for Stone-Ordean-Wells Company I was getting \$2.50 per day, besides overtime when we worked at night. I am sure I could not say how much I was averaging a month; we worked over there every night while I was there. My average wages per month were in the neighborhood of \$70 to \$75. When I was working at Cardell's Lumber Company I made about \$90 per month. Since this injury I have not been able to do any manual labor. I have been working in a drug-store since Christmas and get \$12 per week, for seven days' work. I have not a [46—6] permanent position there and have no provision outside of my ability to earn by manual labor.

Cross-examination.

I stated that it was understood that my particular

(Testimony of William A. Hansford.)

work was to be on the first floor, and with reference to the platform, the first floor of the building was located just the same as if that table was the first floor. It was the floor just underneath the platform. The platform extends practically to the west wall of the building and the distance from the west end of the building, the west wall of the building, to the east end of the platform was approximately, I would presume between 25 and 30 feet. There is a door in the west wall of the building and there are also doors in the east end of the building, and there is a passageway extending from one end of the building to the other, right in front of this platform. As the goods were being moved from the building or into the building this passageway in front of the platform was made use of to handle the goods. It was about three o'clock in the afternoon on the 21st day of June last when the accident occurred. The doors were open and it was light in the building. The work which I did during the twenty-one days that I was employed there consisted of loading salt, sugar—wheeling salt, sugar, etc., out on the platform. The platform that I had reference to is the shipping platform on the outside of the building. Most of that work was done on the first floor. The shipping platform was at the west end of the building. In handling supplies or goods for shipping purposes, or taking goods into the building, we would sometimes take them along this passageway. If unloading cars we would take them in from the side doors. In the disposition of goods as they came in I never had had occasion to put them on

(Testimony of William A. Hansford.)

this platform, but in preparing for shipment I had had occasion to take goods or packages from this platform. I could not say [47—7] how frequently. I possibly was up there fifteen or twenty times while I worked there. It is not a fact that my duties called me on to this platform many times a day. It is not a fact that a great many goods were stored there from time to time and taken off from time to time. The occasions that called me to the platform, the fifteen or twenty times that I have stated when I was employed there, were always in connection with setting goods and taking them down to the first floor. As to how I would bring them down, I tossed most of them over the edge, anywhere along this platform. I might have taken some goods down by carrying them down the ladder, but I have now no recollection that I ever did so. The methods that I observed and that I used in disposing of the goods from the platform to the first floor was by tossing them over the platform to someone on the first floor. I have no recollection of ever having taken down goods or merchandise from the platform than in passing them down to persons standing below.

These coffee cans that were being taken down that day were light, but they were too bulky to toss them down instead of handing them down to Mr. Russell below. I never saw them tossed down.

The height of the platform above the level of the first floor is eight or nine feet. I have not measured it so as to give definitely the exact distance between the first floor and the floor of the platform. In mov-

(Testimony of William A. Hansford.)

ing goods from one end of the building to the other and distributing the goods in the building on the first floor, the floor of this platform and this board were some distance above my head.

Q. And there was no difficulty in you observing how this platform was arranged—how it had been constructed and how the boards were lying there?

A. I never paid any attention to it.

Q. And it was high enough and light enough so if you had [48—8] paid attention and looked at the platform to see how it was constructed that you could have seen it, how it was supported and how the board was fastened there?

A. I presume, if I had made an inspection I could have told it.

Q. Now, this board was in the same position that it was in at the time of the accident, when you first went to work there on the first day of June was it not Mr. Hansford?

A. You mean—

Q. You had observed that board there a number of times as you were moving along the floor?

A. I had not.

Q. Had never noticed this board?

A. Never noticed it.

Q. It was fastened, was it not, or was resting upon a couple of cleats that had been attached to the up-rights?

A. It was.

Q. You noticed that? A. After I was hurt.

Q. You never noticed it before? A. No, sir.

(Testimony of William A. Hansford.)

Q. If you had looked in that direction at any time you would have seen it, would you not?

A. I suppose a person could.

I don't remember what use was made of this board when I first went to work for Stone-Ordean-Wells Company. As to whether I remember of anything being on this board, resting on this board, when I entered the employ of Stone-Ordean-Wells Company, I paid no attention to it.

Q. Didn't you notice the board there at that time or some time after when you went into their employ?

A. I did not.

Q. Didn't you observe what use was made of the board when you first went to work for the company?

[49—9] A. I did not.

Q. Isn't it a fact that at that time there were some spices placed upon this board?

A. I don't know.

Underneath this platform and about four or five feet from the passageway and the edge of the platform were the scales and there were some shelves around in the apartment where the scales were. As to the use that was made of the shelving that was in this apartment where the scales were located, I believe that had spices and a few goods like that in there. I don't know that this board that was up above, resting on the cleats, was made use of for the same purpose, in putting spices on that board. I have no recollection as to ever having seen any spices or any like goods put on that board. It is not a fact that after I went into the employ of the company I and

(Testimony of William A. Hansford.)

Mr. Russell removed the spices that had been placed upon this shelf. It is a fact that I helped remove some of the goods and spices that had been stored on the shelves in this apartment in which the scales were located. As to how long after I commenced working there it was when I helped to remove the merchandise from the shelves in this apartment where the scales were located, I presume two or three days—a day or so. As to how long before the time of the injury this shelving and the merchandise that had been kept there was removed from this apartment, I presume it was about two weeks and a half.

As to the portion of the platform where I was employed when I had occasion to throw down goods and merchandise, it depended on where the goods were located. There were goods on most of the platform and would toss the goods from the platform from the east and west end but most of them were tossed over at the west end.

As to whether the floor of the platform consisted of [50—10] boards extending in a northerly and easterly direction, I never paid any attention to that. I have no recollection now as to how the boards were laid. The board that was below the platform between the uprights was lying east and west. As to whether I noticed that before the time of the accident, I never noticed the board. As to whether I had paid any attention to my surrounding there and taken a look at the way the floor of the platform was constructed and the position of these boards, I do not know as I would have seen it at a glance. If I had

(Testimony of William A. Hansford.)

gone there purposely and examined it I would have. These coffee cans that I was handing down to Mr. Russell that afternoon were located upon the platform close to the center upright and they were possibly three or four feet back from the edge of the platform. At the time the board broke I had handed down some of the cans, and the way in which I handed them down, I picked them up with both hands, stepped to the edge, leaned over and handed them down to Mr. Russell.

Q. And which have you reference to, the edge of the platform or the edge of the board?

A. I stepped to the edge and handed them over.

Q. Yes, but in stepping to the edge of the board you naturally would have to step about three or four inches lower to reach the board than you would by remaining on the platform, would you not?

A. I guess it is that much lower.

Q. Do you remember whether you remained on the platform in handing down the first two or three cans or stepped down on the board.

A. I do not.

Q. Don't you remember? A. No, sir.

Q. So that as far as you now recall, the first two or three cans might have been handed down to Mr. Russell standing below without stepping on the board at all? [51—11]

A. I could not say as to that.

As to how this matter came up of getting the cans and what the conversation was I had with Mr. Russell and who first made reference to the cans, whether I

(Testimony of William A. Hansford.)

or Mr. Russell, I don't remember who mentioned it first. I don't remember how the talk came up at all. I had been wheeling goods out on the shipping platform just prior to the time I went to the platform to get these cans. As to how I happened to go on to the platform to get these cans, I was ordered there by Mr. Russell.

Q. I wish you would tell us what he said in that regard?

A. He said, "Go up and get me down—go up and hand me down those cans."

Q. Then you don't know the conversation with reference to the cans preceding the order that came from Mr. Russell?

A. There was some conversation about the weight of them or something that was. I don't remember the exact words of it.

Q. He then told you to go up on the platform and hand down the cans to him?

A. Yes, sir.

Q. Is that all that was said by Mr. Russell?

A. That is all I remember of.

I went up on the platform and handed the cans down. I could not tell you how far this board extended beyond the edge of the platform. You may understand me to say that I had never observed this board there and had never observed the condition that existed there prior to the time that the board broke with me, and had never observed that there was a space of about three or four inches between the edge of the surface of the floor of the platform and the sur-

(Testimony of William A. Hansford.)

face of the board as it extended between the two uprights. As to whether it isn't a fact that on frequent occasions I had been engaged during the time I was employed there handing down merchandise, boxes and articles from [52—12] the east end of the platform the same place where I was working that afternoon to a person standing below just as I was doing that afternoon, not that I remember of. I don't remember of having done that very thing with Mr. McDonough. I going to the platform and getting the cans of goods and handing them over to him. Nor have I any recollection of ever having done so with Mr. Russell. I have no recollection of standing on the first floor of the building and someone else on the platform handing down goods to me below. I have stood down on the first floor and a person on the platform tossing them down to me. As to whether that was done frequently, I cannot tell you the number of times when I was standing down on the floor and someone on the platform would toss the goods down to me. I recall having stuff tossed down to me, but I have no recollection as to the number of times that was done. In doing that kind of work as the things came down, a person would have to bend his head back in catching the goods as they came down, and one's vision would be on the article they were tossing to him. As to whether in waiting and looking for the article one's vision and sight would be in the direction of this board, a person would naturally have to look up.

Q. But during all this time you never noticed the

(Testimony of William A. Hansford.)

way that this board was located there?

A. Never did.

Q. Never noticed that it wasn't a part of the platform?

A. Never did.

Q. Never noticed that it was from three to four inches below the edge of the platform?

A. Never did.

I had a talk with Mr. Johnston at my house last July, telling him how the accident occurred. At that time I made a statement of the facts and he noted it down and had it [53—13] written out and submitted the statement to me for reading. I did not tell him that the facts as therein given were correct.

Q. Isn't it a fact that you told him that the facts as stated in the statement he had written down were correctly stated and that before signing it you wanted to see your attorneys?

A. I don't know as I did tell him that.

Q. Have you no recollection about that?

A. No, sir.

Q. Have you any recollection now as to what you did tell him at the time? A. No.

Q. You, however, refused to sign the statement at that time? A. I did.

Q. Never did sign it afterwards?

A. No, sir.

Q. Did you tell Mr. Johnston then, anything as to whether the statement was correct or not?

A. I didn't talk very much to Mr. Johnston about it.

(Testimony of William A. Hansford.)

Q. Made no comment one way or the other?

A. No, sir.

As to whether this paper which you have handed me is not the paper Mr. Johnston handed me to read which he had taken down at the time he talked with me about the case or about the accident, I believe it is something similar. I did not after reading the statement call Mr. Johnston's attention to any portion of it that was not correct. I didn't tell him with reference to going on the platform that I went on the platform at my own suggestion to hand down the cans. I made no such statement or statements in substance to that effect. I believe I did state to Mr. Johnston at that time that there was in front of the platform and about four inches lower than the platform an inch board, twelve inches wide, which was nailed to cleats on the upright posts or pillars not otherwise supported, but that I didn't know that this board was not safe and not otherwise [54—14] supported. I didn't make the statement to him that in handing the first two or three cans down to Mr. Russell below I stepped down on the board there with one foot or both feet while I was doing that.

Redirect Examination.

The side door through which a portion of the goods were brought in was on the south side of the building. There is a delivery track for carload goods—cars to stand on running along the side of this building. There are three or four side doors on the south side of the building, and those are the doors I referred to as side doors. The delivery platform was on the west

(Testimony of William A. Hansford.)

end. Three or four days after my injury I returned to the building to get my pay. I went out in the warehouse to make some observations. I saw the board at that time and observed how it had been held up. It had no other support than the cleats on the uprights at either end.

With reference to the visit made by Mr. Johnston, that was Mr. J. H. Johnston, one of the attorneys here for the defendant. I was at home at the time this visit was made and it was made sometime the first day of July. The reason he gave for asking for a statement from me was so that they might effect a settlement. The conversation I had with Mr. Johnston was in the form of questions and answers. He asked the questions and replied to some questions that were made. He made some memoranda on a paper and very short time, a few days, afterwards, this paper here that has been shown to me was presented to me. I read it over at the time it was presented to me, but not much of anything was said about it. There was no request made of me in reference to it, nor to sign it. I never did sign it. Nothing more was said about the matter at that time nor was anything said as to why I didn't want to sign it, nor was I called on afterwards to sign it. As to [55—15] what my condition was at the time with reference to suffering to any extent of Mr. Johnston's visit, my arm was swollen to two or three times its normal size and I was suffering considerably, mentally and physically.

(Testimony of William A. Hansford.)

Recross-examination.

I stated that Mr. Johnston came to get a statement from me for the purpose of seeing whether a settlement could be made. He stated that he wanted to get a statement so he could report to headquarters. I do not remember what else he might have said. As to whether he said anything about settlement at all, he has mentioned it, but I don't know whether it was the day he came to get the statement or not. I believe it was sometime in July when he spoke to me about settlement, but I could not tell whether it was before or after this statement had been taken.

(Examination by the Court.)

These cans that I was handing down were empty, they were all handed down where that board is below the level of the platform. As to whether when I came out and leaned over I stepped out on the board or stepped out the edge of the platform, I do not remember if I was on the board or not while the first cans were handed down. I guess that I was on the board when it broke with me.

Q. Well, do you know?

A. I could not say for sure.

The board was from three and a half to four inches lower than the level of the platform. I do not remember any offset as one would go there and step down. There was no light overhead, but there was light on the west end. It threw the light over the platform through the window and I believe part of the window is above the platform about half a win-

(Testimony of William A. Hansford.)

dow on the west end. As to what was in front of me as I was facing out to [56—16] let the cans down there is a pathway there and the doors were open at the west end and the door was open on the south side. As to what I observed as I looked to let these cans down in the way of an offset in the front of the platform, I did not observe any. I presume that board was about ten or twelve inches wide.

Recross-examination.

There was a side door to the south and I was practically facing this door as I was standing on the platform handing down these cans.

[Testimony of John W. Chaddick, for Plaintiff.]

JOHN W. CHADDICK, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination.

My name is John W. Chaddick and at present I am keeping books for the Billings Electric Supply Company. I was in the employ of the Stone-Ordean-Wells Company in June and previous to June, 1912. I had been with them about twenty-two months. I remember of a platform on the first floor of their warehouse and I remember when the board was put up there between these two upright posts. As near as I can figure that was done somewhere along about February or March, 1912. After the board had been put up there whole cartons of spices, bulk spices, were put upon this board and they remained there probably five or six weeks, I think. I remember when Mr. Hansford came to work there

(Testimony of John W. Chaddick.)

and those spices had been removed prior to his coming there. I helped to take them down myself, and the occasion of their being taken down, the board had gotten weak from the weight of the spices and sagged down. After the spices were put up there I put some supports under the center, and if I remember right these supports were jerked off after the spices were taken down. The support that this board had at either end, I think it was two by four, or something of the kind, spiked to these uprights, those large timbers that run up there. [57—17]

I left the employ of the company on the 15th of June and as far as I remember at the time when I left this board was in the same condition which I have described. As to any directions given to put the board up there, if I remember right, I made the suggestion of putting the shelf up and putting these old cartons of old spices up out of the way and Mr. Russell he sanctioned the suggestion. He said, "Go ahead and put the board up there." That might not be exactly the words but that was the substance of it. In passing by this board on the floor below, unless a person absolutely knew they would take it to be originally a part of the platform. That is the way they would take it.

Cross-examination.

I think the board was put there at my suggestion for the purpose of putting these spices on it, and up to the time that a portion of the articles were removed on account of the sagging of the board the

(Testimony of John W. Chaddick.)

entire board was used as a shelf for these spices. The spices were all removed at the same time. I am not sure as to the time when this removal took place but I think it was before Mr. Hansford went to work. Could not say for sure how long before, but in the neighborhood of two or three weeks any way and perhaps longer. As to whether after the spices had been removed the board remained in this sagged position. I tried to boost the board back to the original position, but if I remember right the cleats were jerked off at that time. I do not remember whether the board sagged a little or whether it was practically straight—I could not say as to that. It is not a fact that only a portion of the spices were removed from the center of the board—they were all removed. As to the condition of this apartment under the platform and whether there was any shelving there, there was shelving plumb around the scales. There were shelves in that entire apartment for the spices awaiting the preparation and getting ready of the spice-room. Part of the spices which had been on shelves under the platform were [58—18] removed a day or two before Hansford started to work, and they still continued on to remove for a few days after he came there. The stuff was being moved at the time he came there. All had been removed to the spice-room before I left their employ, and there were no spices left on the board or underneath the platform at the time I left there.

I had been up on top of this platform for the pur-

(Testimony of John W. Chaddick.)

pose of handing down articles of merchandise. I was in the courtroom this morning while Mr. Hansford gave his testimony and the manner in which he stated that the goods were handed in removing them from the platform was about the way it was done. When the goods were light we would toss them down and when they were too heavy to toss, we would lift them down—kind of scoot them off over the side if too heavy to toss over. I knew the condition of the board and knew it was lower. Of course, I knew the board was there, put it there and knew the conditions of the board, otherwise I might have put my foot on the board.

Q. Aside from the knowledge of the fact that the board was lower than the platform you had no difficulty, had you, in seeing that the board was some lower than the floor of the platform?

A. Sure, I had no difficulty in seeing it or anything like that.

Redirect Examination.

If I would have been in Mr. Hansford's place, knowing no more than he did about it, nine out of ten, or ninety-nine out of one hundred, I would have put my foot on the board.

Recross-examination.

I know nothing as to the extent of Mr. Hansford's knowledge with reference to the position of that board. I was in the basement from the time Mr. Hansford came there until I left.

Q. You don't mean to say—you didn't mean to

(Testimony of John W. Chaddick.)

say, do you, [59—19] that anyone standing upon this board could not have noticed the difference in the height or surface of this board and the height or surface of this platform?

A. Sure they could have noticed the difference.

[Testimony of Dr. A. J. Movius, for Plaintiff.]

Dr. A. J. Movius, called and sworn as a witness on behalf of the plaintiff, testified as follows:

My name is Arthur J. Movius; my profession is physician and surgeon, and I have been engaged in the practice of medicine and surgery nine years. I have been in Billings two years; know Mr. Hansford and treated him during the year 1912 for his injury. Saw him first about the middle of August, I believe, and there was a fracture dislocation in the elbow joint of his right arm. There was no motion in the arm that he could perform for himself. By applying force, it could be moved an inch or two, perhaps. He had no wrist motion at that time. I operated upon the arm and found a fracture dislocation. The head of the radius was fractured in three pieces. There was a forward dislocation of the lower end of the upper arm and the point of the elbow was fractured off and out of the joint where it should be. At the operation two of the fractured pieces of the bone were removed. From the head of the radius and the broken piece of bone that forms the point of the elbow was wired back on to its member and removed the two pieces of the bone from the head of the radius, and restored some of the motion

(Testimony of Dr. A. J. Movius.)

this way. At the present time the elbow has about three or four inches active motion and the injury as it is now is a permanent one. As to what may be expected in the way of improvement, the amount of improvement will not be much unless further operative procedure is gone through and then we cannot promise anything. The arm causes pain and suffering in its present condition, and there is a reasonable probability that it will last for some time. You cannot say how long because of the nature of the injury. I took an X-ray picture of his elbow and have them with me. (Witness [60—20] producing X-ray plates.)

X-ray plates offered and admitted in evidence as Plaintiff's Exhibits 1, 2 and 3, and it was agreed that the American Tables of Mortality show the expectancy of life of thirty years to be thirty-five and thirty-three hundredths years.

Plaintiff rests.

[Testimony of Thomas J. McDonough, for Defendant.]

THOMAS J. McDONOUGH, a witness called and sworn in behalf of the defendant, testified as follows:

My name is Thomas J. McDonough; reside at Billings, Montana, and am the manager of the Stone-Ordean-Wells Company here in Billings. I have held that position three years and nine months and was manager on the 21st of June, 1912. Am acquainted with the plaintiff; he worked for our com-

(Testimony of Thomas J. McDonough.)

pany during the month of June, 1912. The model which has been exhibited here is a fair representation of the platform with reference to which testimony has been given. The platform was constructed in the month of August, 1911, and was put in for the purpose of storing on it light merchandise, such as boxes of clothes-pins, paper-cutters, empty coffee cans and different kinds of light material in the grocery line. I remember about the time when this board was put in between these uprights. The purpose of putting up that board was to serve as a shelf for holding some of these bulk spices. We had no apartment there to keep the spices at the time the board was put up but just a temporary spice-room built under the platform where the scales were. That is the place underneath the platform between the two uprights extending backwards. The arrangement made under the platform for the storing of spices was shelving, and we retained the spices in that locality approximately eight months, until the room or apartment for the storing of the spices had been completed upstairs. This board or shelf was never intended to be used nor was it used for any other purpose [61—21] than as a shelf for the storing of the spices and other articles of merchandise such as could be placed there. It was used for the storing of spices, at the time the plaintiff went into our employ, these spices had not been removed. With reference to the spices that were shelved under the platform they had not been removed at the time

(Testimony of Thomas J. McDonough.)

Mr. Hansford entered our employ, not to my knowledge. I think it was about a week after he entered our employ that we finally cleared out the spices underneath the platform. As to whether the spices had been removed from the board at the time Mr. Hansford entered our employ, that I could not answer. I don't know whether the spices were on that shelf at that time or not. I don't remember. I am quite sure these spices on the board and the spices that were stored underneath the platform were all removed about the same time. The size of the platform is about as has been stated, thirty feet in length and twenty feet wide and extends from the west wall of the building about one-third of the way up the length of the building. There is a large shipping door at the west end of the platform which is our main door getting into the house and out of it. Besides, there is a window over the door in the west wall of the building right in the center of the building. The edge of the platform comes right up to the north edge of the door opening. It is a double sliding door, and when open there is a space eight feet in width and eleven feet in height. There is a window over the door and the side of the window is about five by five feet. As to the openings on the south side of the building, there are three doors, they are smaller than the one that opens on the west end. There are no windows on the south side of the building. There are doors and windows on the east end of the building, and at the time of the accident the

(Testimony of Thomas J. McDonough.)

doors were all wide open. It is very light in that part of the building where this platform is located. I had frequent occasion to be in the vicinity of this platform during the time that this board [62—22] was attached between the two uprights at the east end of the platform and it could be very easily observed that the board was not on the same level with the floor of the platform. During the time that Mr. Hansford was working there I was frequently off and on the platform for the purpose of putting down merchandise and taking some up. I have done that work myself at times. It was very readily observable to anyone standing on the platform that the board was not on the same level with the floor of the platform. This was observable as well from the floor below. I am quite sure that I have had occasion to take goods or merchandise from the platform and hand them down when Mr. Hansford was standing below and handing them down to me. The distance from the floor of the building up to the floor of the platform is about eight feet. As to the kind of a day it was on which this accident happened, it was a very hot, sunshiny day. I never noticed anybody in my employ engaged in that kind of work in taking down goods from the platform and handing them down to the one standing down below use this board as a foot rest to step upon in handing down the goods. The principal part of the work done by our employees and of the plaintiff particularly during the time he was employed by us is down at the west end in front

(Testimony of Thomas J. McDonough.)

of this platform. They have to go back and forth through there probably one hundred times a day. The scale is right under this platform and the distance from the edge of the platform back to where the scales stand is four feet.

Cross-examination.

I have been in the employ of this company as general manager for three years and eight months and have the general supervision of all the work at this point. I have assistance in the office and it is my custom to actually engage in handling merchandise. I also look after the office work but not all of it. As to what portion of my time I would spend out there [63—23] handling merchandise, that would be hard to determine, just the exact proportion of my time. The handling of the merchandise is a portion of the business that has to be looked after and I get out there and work myself with the men. It is not only when there is no sufficient assistance out there to get the work out when I go out to help, I go out every day and work some on the floor. I could not remember now if my attention was called to it specifically the various articles which I have helped others handle. There was nothing particular about the merchandise which I assisted Hansford in handling which fixed it in my mind other than the same would be put in there. There was nothing special about it. I have a distinct clear recollection of assisting Hansford in his work out there in handling merchandise, both on the platform and

(Testimony of Thomas J. McDonough.)

down below at different times as the occasion might happen. I mean to say that I have stood down below and have had Hansford hand down articles to me. I remember that, but I could not remember the character of the goods nor could I remember the days it was. I could not remember where I stood and where he stood, not right at the exact spot. As to whether I remember whether it was handed down or tossed down, it was both. I knew this board was there, but did not know how it had been constructed. I had not personally told these men that it was a dangerous situation and to take these spices off there. I never told them anything about it being up there. My recollection is clear as to the condition of that board—the condition that board was in and the stuff up there. There was never anything in the condition about the weight on this board which occasioned the removal of the stuff from it, no occasion that ever had me tell any men to remove anything from it. I didn't observe that the weight upon this board was sagging it down and leaning over there. I was not present when the board was put up there. My attention was called to it the first time I came out on the floor, I noticed it. As to whether I examined to see how it was put up, [64—24] I looked and saw it was a shelf put up. A temporary shelf, because they were putting up lots of temporary shelving at that time. I don't remember the exact date when this stuff was taken off of this shelf. Mr. Hansford was in the employ of the company at the time the

(Testimony of Thomas J. McDonough.)

spices were removed from down below, and I think Mr. Hansford was there when they were removed from the shelf. As to the removal of the goods from the shelf, I have no recollection about it other than those spices, to the best of my recollection were all moved about the same time. Some of the spices down below were moved after Mr. Hansford joined forces with us.

[Testimony of Cass. G. Russell, for Defendant.]

CASS. G. RUSSELL, called and sworn as a witness on behalf of the defendant, testified as follows:

My name is Cass. G. Russell; live at Vancouver, Washington, and am twenty-one years of age. My parents are living here in Billings; my father is in business here, the Russell Lumber Yards. I have been in the employ of the defendant company. The last time I was employed was from about the first of March, 1911, to the 28th day of December, 1912. I was in the employ of the company during the month of June, 1912, as shipping clerk, and was doing my work in the west end of the building where this platform is located. I am acquainted with the plaintiff, Mr. Hansford; he worked there during the time I was shipping clerk. I do not remember the exact month when this board was put between these two uprights in front of the platform, that it was there in February or March, 1912. It was put up there for the purpose of holding the bulk spices we had in there. We had no other room to place them without having the spices distributed all over the house, so

(Testimony of Cass. G. Russell.)

the board was put up there to hold all bulk spices. It was never used for any other purpose. I remember the occasion of this accident that befell Mr. Hansford and I am the person to whom the coffee cans were handed. As to how it came about these cans were handled, it was the last order during the day. We were [65—25] just about through, about three o'clock. It was the last consignment of goods going to different parties and this was a Stone-Ordean-Wells Company order to put up to ship to them. I looked at the order and read it off and there were a certain number of coffee cans to go back to the home house, and I noticed they were below shipping weight. The shipping weight is 135 pounds, that is, the minimum. If you ship less than 135 pounds they would charge you the same as if they were for 135 pounds. I went in the office to see whether I should ship it or not and I got the orders to ship them and I came out and told Mr. Hansford that we would ship the cans. Mr. Hansford then said he would go up on the platform and get the cans. I was in the courtroom this morning when Mr. Hansford testified and heard him state that I ordered him to go on the platform and hand the cans down to me, but I did not order him. As to what happened after that, while he was going up, I got the truck ready to receive them. He handed down three of these cans and I put them on the truck and labeled them and put them on the platform, and when I turned around to push the truck away from me to

(Testimony of Cass. G. Russell.)

make room, and when I was doing that he fell. The elevation of this platform above the floor of the building is eight feet and one and a half inches.

I observed Mr. Hansford as he handed down the first two or three of the cans to me from the platform. I had to lean back or bend back my head for the purpose of taking hold the cans as they were handed down to me. In handing down the first two or three cans Mr. Hansford was standing on the platform itself. As to whether there was anything to prevent the plaintiff handing down the cans to me from the platform west of the uprights instead of handing them down to me east of the uprights there were things on the west of it, but there was a six foot clear space from which he could have handed them down. A six foot clear space from the uprights over towards the wall. As to how [66—26] we happened to do the work of taking these cans down east of the uprights rather than to the west of the uprights, I took my position according to Mr. Hansford as he started handing them down. I got my truck ready there at the door at the west end of the building, came back to the platform, and Mr. Hansford was standing there waiting to hand me down the cans, and I got my truck in a position to receive it. I should judge it was about two feet east of the upright where Mr. Hansford was standing. I never saw anybody make use of this board in handing down goods as a foot-rest or place to stand on in lifting articles of merchandise from the platform

(Testimony of Cass. G. Russell.)

down to a person below on the first floor to receive them. The board was put there to put bulk spices on.

The spices were finally removed from the board about the first week Mr. Hansford was there, a portion of them had been removed at the center but all of them were not. I have no recollection as to how much of the stuff that had been on the board remained there at the time Mr. Hansford went to work for the company, but I should say about one hundred pounds. They were at both ends and scattered out and not placed at any one spot. I removed the spices from that board that remained there at the time Mr. Hansford went to work, I removed them myself, tossing them to Mr. Hansford who was there down below, when we were removing them to the spice-room. Mr. Hansford assisted me in removing the spices; he was on the floor and I was on the platform.

I heard the testimony of Mr. McDonough as to the conditions that existed there with reference to the door and lights, and the conditions are exactly as he stated. It is lighter in that portion of the building than in any other part, and anyone standing on the floor below could easily see that this was a board put up there resting upon cleats fastened on the uprights, and that it was not on the level with the level of the floor of the platform. As to the opportunity of a man on top of [67—27] the platform to see that the board was lower than the platform and was not a part of the platform, he has a

(Testimony of Cass. G. Russell.)

better opportunity above than he has below. During the time that Mr. Hansford was working there I did not observe him handing down anything from the platform other than this time of the accident, but I have seen him tossing goods down. In fact, he has tossed things to me, but I never saw him handing anything down. I have seen him standing below while someone else was handing or tossing things down to him, and as to how frequently that occurred during the time he worked there, I should say at least ten times a day anyway. As to the frequency that a person had to go on the platform there during the day to get goods or to store goods there, or to get goods for shipment, at least fifteen or twenty times a day.

I stated that that portion of the building where the platform is was lighter than any part of the building, the scales are right down by the shipping office and it is light enough there so you can read the figures on the scales. The scales were underneath the platform and a little to the rear of the edge of the platform. As to the extent during the time that Mr. Hansford was employed there at the warehouse, he was required to be in this part of the building where the platform was, if he was helping when I was taking charge of the shipping, anything that had to be weighed out had to go to that platform to the scales to be weighed. We had no other scales to weigh on. At various times things came down from the top floor and up from the basement to be weighed, and as Mr. Hansford had charge over the

(Testimony of Cass. G. Russell.)

first floor, he had to weigh them. As to how frequently conditions would arise requiring merchandise to be weighed, at times as much as every half hour.

My height is five feet nine and a quarter inches and standing on the floor I can touch a point seven feet seven and a quarter inches high. Anyone standing on this platform handing [68—28] down cans to a person standing below can easily do that by standing on this platform. By trial made this morning, my fingers would just touch that board and all he had to do was to reach it over the edge to me.

Cross-examination.

I am now a soldier in the United States Army, stationed at Vancouver. I came here as a witness at the request of the defendant. I left the employ of this defendant about December 28, 1912, and have been in the army since the first of January, 1913. The first time my attention was called to the occurrence here was when Mr. Hansford was first hurt. I had three different positions with the company. I was trucker from the first of March, 1911, until in May, 1912. In May, 1912, until the last of October I was shipping clerk, and had charge as shipping clerk on all three floors. The men on the various floors took their orders from me, and I made it my duty to give special orders with reference to the shipments to see that they were promptly gotten out and properly assembled. Mr. Hansford had been in the employ of the company about three weeks before his injury and his work had been almost en-

(Testimony of Cass. G. Russell.)

tirely on the first floor. He had worked on other floors when we were putting goods on other floors. He would do that under my directions. As to the particular work he was required to do when he first came there, he was to truck and fill orders just the same as the other men.

It is my recollection that all of the spices had not been removed from this shelf when he came there to work. As to what there was about the removal of these spices which fixed it in mind with respect to who there was employed by the company the time of the removal, there were various little incidents—with a joke and various things, I cannot remember some of them. As to one of the jokes that occurred at that time which fixed it in mind that Hansford was there helping taking these things off the shelf, [69—29] he tossed me a box and it came down with the lid down and I went to catch it, the lid dropped out and everything spilled all over. These spices were on top of the platform; he did not take this off that shelf. I didn't understand that you were talking about the spices on the shelf; I took those off the shelf myself and they were bulk. As to what it that fixed it in my mind that Hansford was there at the time the spices were removed from the shelf, the main reason was that all the spices were removed in two days—one day and the next night following. After that one day and one night there remained no spices there upon any of the shelves anywhere. It didn't take a week or two or anything like that to get those spices out of there. I know

(Testimony of Cass. G. Russell.)

just about the time they were changed. It was right around the 5th of June. As to whether the length of time to do it is all that causes me to think Hansford was there, I have the time down. There is nothing special to refresh my recollection about the fact that it occurred the 5th of June. I made no memorandum of it. There was nothing unusual to it. We were constantly moving goods in there but it was about two weeks before the accident that the spices were removed.

I remember the conversation that I had with Hansford on this particular day about these coffee cans, whether or not we ought to ship them in view of the fact that they would not make weight. That matter was under discussion between us. We were standing there on the floor and after I found out from the office that they were to be shipped, I stated to Hansford, "We will ship them out anyway and bill them out as 135 pounds." I made some inquiry about it and came back and told him that we were going to ship them anyhow. I didn't tell him anything about what to do.

I had frequently been up on the platform and threw stuff down myself. Just as soon as I saw him going up the ladder [70—30] I went to get my truck. There was nothing said between us as to how they should be *out* down. I didn't tell him that I would take them, and that I would have them handed to me. I never said I was going to assist him and didn't tell him that he might hand them to me and I would take them. I simply went over to

(Testimony of Cass. G. Russell.)

get my truck, and he went up on the platform and nothing whatever was said. After I got my truck, which was over near the door, I went over in front of this board with my truck. I observed then that Mr. Hansford was up above and had the coffee can in both hands. I reached up with both hands and took it. I stated that I can reach seven feet and seven and a fourth inches standing on the floor. I didn't say anything to Mr. Hansford. I was standing on the floor down below this board and observed that Hansford's feet were not on the board. I could see he was standing back on the platform. I made that particular observation from the distance he had to stoop. The bottom of the can came below his feet. It is not very awkward to stand back on the platform and lean over and drop this can so that I could get it, standing back on the platform. It occurred to me at that time that it would be dangerous for him to step out on the board and that he didn't do it. I didn't say anything to him about being careful, not to step out there because I supposed he knew it. He handed me in that same way three cans and I observed particularly each time that he was standing back of the board and on the platform and pushing the can out over the edge of the board. That occurred with each one. After the cans were handed to me I put them on the truck and labeled them—wrote the name on them—on a card, a shipping card—and tacked them on the side. I put the cans on the truck and fixed them. There were three of them, and the next thing I knew

(Testimony of Cass. G. Russell.)

Hansford was on the floor, after I kicked the truck away to make room for another truck load. I was kicking the truck away when he fell. I didn't see [71—31] him fall as he was handing down the fourth can and I don't know anything about how that happened.

As to whether I meant to say that all the light seemed to focus on this particular board in this particular part of the platform, not necessarily on the board, but in that vicinity. It would not appear to one standing down on the floor and looking up eight feet that the board was a part of the platform. I was there when the board was put up and know just how it was put up. I remember there had been some pieces in the center of the board that held it up. They were not taken off; they were there the day of this accident. They were not taken off. The board remained that way until long after that. They were nailed boards three feet long running away back underneath and well nailed. I saw that done,—saw them put on there and they were there at the time Hansford fell and afterwards.

Redirect Examination.

Mr. Hansford told me that he would go up on the platform and hand down the cans before I went for the truck, just after I informed him that we would ship the cans. When he started to climb the ladder to get on the platform I went after the truck. There was another support holding up this board which was a cleat or something in the nature of a cleat, three of them along there, strung about equal

(Testimony of Cass. G. Russell.)

distance along between the posts. These cleats that were attached to the uprights on which this board rested were visible to anyone standing on the floor below. They extended out for a foot beyond the posts out in the alley way. The branch of the Military Service that I am in is the engineering department.

(Examination by the Court.)

I stated that when I had the first three cans on the truck I put tags on them. I didn't see Hansford come back with the fourth. He was getting these cans about four feet back from [72—32] the first post east of the door. It took me about a minute to tag these cans. I had my tags all ready.

[Testimony of Henry T. Sievers, for Defendant.]

HENRY T. SIEVERS, a witness called and sworn on behalf of defendant, testified as follows:

My name is Henry T. Sievers, live at Billings and at present am driving a delivery wagon for J. M. Malin. I have been in the employ of the defendant company but don't remember the exact date. I worked for them about nine months. I quit their service the 15th day of May along there. I was in the employ of the company at the time when this shelf was put up there in front of the platform. I remember how it came to be put there. We had quite a bit of spices. All the spices were on shelves around and seemed to be mixed up a good bit. The bulk spices were kept also on the shelves around the scales and we built this extending out in front to put these bulk spices on so we could assemble

(Testimony of Henry T. Sievers.)

our orders quickly. I helped to put the board up. In a way I was the one that suggested it and helped—I helped “Chad” put it up. It was put up for the purpose of holding the bulk spices and it was never put up for the purpose of being used as a place for a person to stand on. Mr. Chaddick and I put the board up at our own suggestion. During the time that I was working there I never saw anybody use the board for the purpose of standing on it.

I am familiar with the conditions there in that part of the building as to light. There seemed always to be plenty of light there; we used the scales there, and except on real dark days, without an electric light. I think anyone on top of this platform ought to be able to notice that this board was lower than the platform and anyone standing below on the floor ought to observe it. I know I would have noticed it. As to what I know of any conversation Mr. Chaddick might have had with Russell or anybody else about this board, Mr. Russell was not [73—33] shipping clerk at this time. He left it to “Chad” and I. We worked together as much as possible putting up orders and at closing. We were together most of the afternoon working around and putting the things in order. Russell was made shipping clerk after Frank Young; I don’t know the date. I have no idea whether it was in February or March.

[Testimony of Emery E. Oberweiser, for Defendant.]

EMERY E. OBERWEISER, called and sworn as a witness on behalf of the defendant, testified as follows:

My name is Emery E. Oberweiser; live in Billings and am fifteen years of age, and now driving a butcher wagon. I have been in the employ of the defendant company, worked for them about two months and quit about June 5, 1912. During the time that I worked for the company this board was there in front of the platform. I had occasion to observe that board there. When I went up on top of the platform to get lamp chimneys I noticed it. I had occasion to go up on top of the platform, and would do so by means of the ladder, and it was in that way that I observed the board. I also observed that the board was lower than the floor of the platform. I had no difficulty in seeing that. I saw it as soon as I got my head above the platform. There were not any spices on the shelf at that time that I noticed; there were not any there.

[Testimony of J. H. Johnston, for Defendant.]

J. H. JOHNSTON, called and sworn as a witness on behalf of the defendant, testified as follows:

My name is J. H. Johnston; am an attorney at law; have been such for about eighteen years, a little over; am practicing my profession in the city of Billings and came here first eighteen years ago; was away this year, and the rest of the time I have been here.

(Testimony of J. H. Johnston.)

I know the plaintiff and had a talk with him about the facts or the circumstances of this accident. I could not give you the exact date when I had this talk, but it was either one of the last two or three days of June or the first day or two of [74—34] July, 1912. It was at his home and my purpose in going there was to get the facts of the matter and make a report on it. He made a statement to me at that time. I questioned him and he made a statement. I jotted down notes from what he said. It was mostly by means of interrogations on my part and answers by him. I reduced the statement he made to writing by jotting down with a lead pencil, either in a book or on a piece of paper,—I think a small book I had. I told Mr. Hansford at that time that I wanted him to sign the affidavit, and to drop into my office a day or two later—I think the next day he dropped in—it could have been the same day. It seems in the afternoon of the next day he came into my office and I had a statement prepared from the notes in the form of an affidavit. I handed him the statement and asked him to read it and if there was anything wrong about it to make the corrections. He read it and I asked him if it was correct and he said as far as he could see it was. He and I talked a short time, for a few minutes and he said, "Could I take this out with me?" and I said "Certainly." He went out with it and I think the same afternoon—I think it was—he said his attorneys told him not to sign it. The paper which you handed me is the statement that I prepared.

(Statement offered and admitted in evidence and marked Defendant's Exhibit "A," reading as follows:)

[Defendant's Exhibit "A"—Statement.]

State of Montana,

County of Yellowstone,—ss.

William A. Hansford, being first duly sworn upon oath says: That on the 21st day of June, 1912, while in the employ of Stone-Ordean-Wells Co., at Billings, Montana, and engaged in the work of the company in their warehouse he was injured as hereinafter set out: That he was at work on a wooden platform about eight or nine feet above the first floor of the building, handing down to Mr. Russell, another employee of the company, empty coffee cans crated, which with the crating weighed about fifteen pounds each; that it was necessary to either hand the cans down or carry them down a perpendicular ladder; that prior to the injury affiant had been working in the warehouse for the company about three weeks, and had been on this platform about fifteen or twenty times before, but before the day of the accident he had only taken down things that could be easily carried [75—35] down or tossed down; that it was about three o'clock in the afternoon when he was injured, and it was pretty light in the place where he was working, as light as anywhere else on the first floor of the warehouse, but that he had just returned from the platform at the west side of the building, where he had dumped a truck of merchandise, and that the glare of the light

from the platform and side of the building made things in the building appear less distinct, when he came back into the building; that he had been back in the building about five minutes before the accident occurred; that they were filling an order of things to be shipped back to Stone-Ordean-Wells Co., at Duluth, Minn., and that at his own suggestion, affiant went on the platform to hand down the cans; that he had handed down three or four cans before the accident happened; that in front of the platform and about four inches lower than the platform, there was an inch board, twelve inches wide, which was nailed at each end to cleats on upright posts or pillars, and not otherwise supported; that affiant did not know that this board was not safe or not otherwise supported than as above stated; that he had never examined this board to see if same was safe or how it was supported; that he had never had any reason to; that about two weeks before this, Mr. McDonough ordered some partitions to be removed from beneath this platform; Mr. McDonough was the manager of the company's business at Billings, and he said at the time that the platform would be safe or reliable after the partitions were removed; that the first can was handed down from near the west post and as he handed down each successive can he moved further from the post, so that when he handed down the can at the time the accident occurred, he was about five feet from the west post; that in handing this can down, as in handing down the others, he stepped with one or both feet, but is not sure whether one

or both, upon the above-mentioned lower board, and it broke and he fell to the floor above described striking apparently on his right shoulder and right hip, breaking his right arm near the elbow and bruising his chest; that affiant was conscious all the time, but somewhat dazed by the fall; at his request they threw water in his face and gave him a drink, put his arm in a sling and he went to the doctor to have same attended to; that his arm soon began to swell and turn black, and is now swollen from several inches above the elbow to near the finger tips, and is black on the outer side from near the wrist to above the elbow; that his chest was so badly bruised that he had to call the doctor the first night to attend the same, and it still hurts him somewhat in breathing; that his arm is now in a half-cast and pains him so that he has not been able to sleep well, the greatest pain being in the wrist and upper part of the hand; that no one had ever suggested to him that the lower board mentioned above was not securely fastened or that it was dangerous, and that he had not asked whether it was safe or secure; that he does not know just what position he was in when the board broke; that the board broke almost straight across, and broke at about the point on which he was standing; that when he was handing down the cans before the board broke and until it broke and gave way there was nothing to indicate to him that it was not perfectly secure and safe, there did not appear to be any spring to it; that the bruise on the chest was probably caused by

(Testimony of J. H. Johnston.)

striking on an empty can, but affiant is not certain as to how same was caused.

..... [76—36]

Subscribed and sworn to before me this day of July, 1912.

.....,
Notary Public for the State of Montana, Residing at Billings.

My commission expires August 7, 1914.

I could not say how many times I saw the plaintiff. I saw him at the house once and after that I called again,—I think I made the second call after that, and I saw him at the office once when he brought back the statement. At least those four times. At the time of taking the statement I told him that the purpose for which I wanted the statement was to ascertain the facts to see whether the company would be responsible, to make any settlement.

Cross-examination.

I think I was first employed to look after this matter the latter part of June, that is, to get the report, not to represent them in the case, but simply to get a report of the facts. It must have been ten or fifteen days after the accident. It was either the last two or three days in June or the first couple of days in July that I first called upon Mr. Hansford. In making my investigation of the facts I had seen Mr. Russell and talked with him, and I took an affidavit. I didn't take affidavits of all of the witnesses who appeared here, I only saw Mr. Russell and Mr. Hansford, I think, the only ones who testified except Mr.

(Testimony of J. H. Johnston.)

McDonough. I took Mr. Russell's affidavit but I have not the affidavit now. The purpose of getting this in the form of an affidavit was to get a sworn statement, as I thought it would be more reliable to get it under oath. That was my purpose. I think that at the time I went to Hansford I had had a talk with Mr. McDonough. I am not sure about Russell, but about the same time. I am not certain whether McDonough had told me how the accident occurred, I don't recall. I first called on this man down at his home and I should think that he was suffering a good deal at that time, but I could not tell. I think he was suffering quite a bit, to my best judgment. I was [77—37] there probably twenty minutes, from fifteen to twenty minutes. I talked with him about this accident and made memorandum in a book or on a slip of paper. I have not that now. I cannot show you the memorandum that was taken at that time, which I took down in the first instance. I then went down to my office and there prepared this original written statement called Defendant's Exhibit "A." I do not recall that I again talked with him before preparing it, other than the first time. My recollection is just once. I asked him to call at my office and he did so. That was long prior to the commencement of any suit, about the first days of July, I think. I would not say what was said to Mr. Hansford at the time I obtained a statement. I told him I wanted to get the facts on the question of whether they were liable and whether or not there would be a settlement. I didn't express any opinion of my own as to the

(Testimony of J. H. Johnston.)

question of liability. When Mr. Hansford called at my office, I think he himself read the statement which I had prepared. I think I handed it to him and he read it himself. I am not quite sure. My recollection is that then I asked him if it was all right and if there were any corrections to be made to make them. Told him that before he started to read it, if there were any corrections to tell me and they would be made. After he got through I asked him if it was all right, and he said "as far as he could see." As to what he said as to why he didn't sign it, I asked him if there were any corrections to make, if there were any corrections to make to make them. I don't know whether he asked—but in a very short time he asked if there was any objection to him taking this out home and I said no, none whatever. He brought it back and told me that his attorneys had advised him not to sign it and he would not. He didn't say in that communication that he had found it didn't represent the actual facts about it. When he said his attorneys advised him not to sign [78—38] it, that was all, and I didn't ask him why.

Defendant rests.

**[Testimony of William A. Hansford, in His Own
Behalf (Recalled in Rebuttal).]**

WILLIAM A HANSFORD, recalled in rebuttal in his own behalf, testified as follows:

Q. Mr. Hansford, at the time you went down to the wholesale house after the accident, which, as I recall your testimony, was three or four days afterwards, were there any cleats on this broken board at

(Testimony of William A. Hansford.)

or near the space where the board was broken?

A. Not that I saw.

Q. Did you examine the board at that time?

A. I looked at it.

(Examination by the COURT.)

Q. You had the can in your hand when you fell.
Did it fall with you?

A. I went down on top of the can.

Q. Russell wasn't ready to take it when you fell?

A. He was reaching up after it.

Q. At the very time when you fell?

A. Yes, sir.

Q. Can you say whether you stepped on that board
or whether you stepped over?

A. No, I cannot.

Q. How did it break unless you stepped on it—of
course, that is a mere argument possibly. Has it
escaped your recollection or did you ever know so far
as you know now?

A. I had no reason to think about stepping on the
board at that time.

Q. I mean the fact that you do not seem able to
recollect whether you stepped on the board or
stepped over it and fell.

A. I stepped on the board and it broke and I went
down through it.

Plaintiff rests. [79—39]

And thereupon at the close of the evidence the de-
fendant moved the Court to instruct the jury to re-
turn a verdict in favor of the defendant as follows:

[Motion for a Directed Verdict in Favor of Defendant.]

Mr. RASCH.—Now comes the defendant in said cause and moves the Court to direct the jury to return a verdict in favor of the defendant upon the grounds and for the reason following, to wit:

1. It has been conclusively shown by the evidence, which is uncontradicted, that the board upon which the plaintiff stepped and in consequence of which he fell to the floor below, sustaining the injuries of which he complains, was not put in for the purpose of being used as a place to step upon, but the only purpose for which it was put up and intended to be used was to serve as a shelf for the goods to be kept upon such shelf, and was at no time intended to be used or used for the purpose of disposing of goods from the platform to the floor below.

2. The evidence shows that the accident and the resulting injury to the plaintiff was wholly due to the plaintiff's own negligence in the performance of the work which he was doing at the time when he stepped upon the board, resulting in the breaking of the board and his being precipitated to the floor below.

3. The evidence shows that the accident resulting in the plaintiff's injuries was entirely due to causes the risk of injuries from which he had assumed.

4. It appears from the evidence without contradiction that the method in which the plaintiff performed the work which he was performing at the time of the accident was a method adopted by him-

self, and of his own choosing, and that if there was any danger or any risk in handing down the goods or the cans from that portion of the platform along which the board extended, there were other places and other means provided in which the work could have been performed, and that if there was danger in doing the work as it was done, it was selected by the plaintiff, [80—40] choosing the dangerous way when other ways were open to him which were not dangerous.

5. There is a complete failure of proof in support of the allegations of the complaint that there was any negligence on the part of the company in the placing of the board in the manner in which it was placed, alongside of the platform, and there is no proof to show that the defendant company was negligent in any of the particulars alleged.

6. The complaint does not state facts sufficient to constitute a cause of action.

Which motion was by the Court then and there denied, to which ruling of the Court and denying the defendant's motion for a directed verdict in its favor, the defendant then and there duly excepted.

And thereupon, after argument of the case by counsel to the jury, the Court gave to the jury the following instructions:

[Instructions.]

By the COURT.—Gentlemen of the jury, the time has come for the Court to instruct you in reference to the law of the case, and it may comment upon the facts if it pleases, but in this case, while you take the law and rules of law that command and govern the

case from the Court, it is your right and duty to find the facts for yourselves. If the Court at any time in its comment on the facts in any case in this court should indicate to you what its opinion is of the facts, and what witness is telling the truth or otherwise, you are not bound by that opinion and can disregard it, unless it recommends itself to you or your conscience as well founded. You take the law from the Court for several reasons and the principal ones are:

1st. That the Court is presumed to give the law always the same, and as not every case is governed by the same law; if you were to take your own idea of the law, you might think the law is one thing, and tomorrow if the jury was left to decide it, they might say we have a different kind of law governing this [81—41] case. Furthermore, if the Court should make any mistake in the law, it is a matter of record and can hereafter be corrected; hence the reasons why you are obliged to take the law from the Court.

This is what is termed a master and servant action. The plaintiff seeks to recover damages for injuries alleged to have been received as a result of the defendant's negligence. The kinds of negligence alleged are, that the defendant had failed to provide or have any rail along the outer edge of the platform upon which the plaintiff was working.

2d. That the defendant had failed to provide a sufficient support under the board which extended beyond the edge of said platform upon which the plaintiff stepped and the breaking of which caused the plaintiff to fall.

The defense is: First: That the defendant had been

guilty of no negligence in the particulars mentioned.

Second: That the board was placed there solely as a shelf on which to deposit articles and not as a stepping place.

Third: That the plaintiff knew the situation and appreciated the circumstances involved, and hence assumed the risk of it.

Fourth: That the plaintiff's injuries were due entirely to his own negligence.

You are instructed that the plaintiff, if he recover, must do so upon the ground of the negligence alleged. It is the law that the master must exercise ordinary care to provide his servant a reasonably safe place to work. This duty which the law imposes is absolute, and the master is responsible for the negligence to any servant to whom he delegates the performance of such duty. If you find from the preponderance of the evidence that the defendant failed to provide any railing along the outer edge of said platform, and failed to provide sufficient support extending beyond the edge of the said platform, [82—42] and if you further find, in the exercise of ordinary care on the part of the defendant, it required such railing and additional support for said board, then the defendant's failure in such regard would be negligence, and if by reason thereof the plaintiff fell and was injured, the defendant would be liable for the injuries so proximately resulting, and your verdict should be for the plaintiff in such an amount as you find, under the proof and these instructions, he is entitled to receive; unless you also find that the risk or danger was communicated to the plaintiff and he was guilty of con-

tributory negligence.

In this case the burden of the proof is on the plaintiff to prove the negligence charged, to your satisfaction, by a preponderance of the evidence; otherwise you will find for the defendant.

Preponderance means the greater weight of evidence. Unless the plaintiff's own evidence has established that he was also guilty of negligence, causing the injury or contributing to the injury, or he had assumed the risk of the situation, the burden is on the defendant to prove, either that the plaintiff had assumed the risk of the situation and was himself guilty of negligence, contributing to his injury, by the preponderance of the evidence, that is to say, the greater weight of the evidence.

You are the sole judges of the credibility of all the witnesses and of the weight to be given to all the evidence. You determine the credibility of the witnesses by their interest in the case, if any; their motive, if any; their appearance and demeanor on the witness-stand; manner of testifying and the statements they make; whether they contradict themselves or are contradicted, by others. Upon all of this you make up your minds what witnesses are entitled to credit and how much weight is to be given to their testimony.

You have inspected the premises where the injury occurred. That is not to enable you to form any independent [83—43] judgment as to how it occurred, but simply that you may understand the evidence you heard in court and to better apply it, and determine where the truth lies between the parties.

All witnesses are presumed to speak the truth. This applies to the plaintiff when he testifies as well as any other witness, but of course in considering the testimony of the plaintiff, you have a right to consider his interest in the case and in the result. You are not obliged to believe a thing as so simply because some witness swears it is so. It is for you to determine whether, in any part of the testimony and to what part of it the witness is entitled to credit and how much, if any, you shall feel he is entitled to. A witness who testifies falsely before you in any manner, you have the right, if you believe any witness has so testified, you have the right to distrust the remainder of his testimony and reject it if it does not seem to you credible.

When the plaintiff took employment in the defendant's warehouse, the defendant had the right to assume that he had the reasonable skill and experience ordinarily required for such work, and the law holds the plaintiff to exercise the same degree of care for his own safety that a reasonably careful person, possessed of such skill and prudence as is ordinarily exercised under like circumstances, if you find from the evidence in this case that by the exercise of ordinary care the plaintiff would have known of the manner in which the board was placed and of the danger in using it as a place to stand on or step upon, then the plaintiff cannot recover and your verdict should be for the defendant.

It would appear from the facts in evidence here that the defendant's servants placed the board that finally broke, where it was placed, for the purpose of

a shelf only. The evidence is such that you could not come to any other reasonable conclusion, but that is not conclusive that the plaintiff would not be [84—44] entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering the situation of the elevated platform and this shelf placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom. It is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping-place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employees were likely to step on the board; if the defendant ought to have known that the board was likely to be so used. If it should reasonably have anticipated that its servants were likely, in handing down merchandise to make use of this shelf as a stepping-place, then it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping-place, even as though it had originally erected it for that purpose. On the other hand, in your judgment, the defendant would have no reason to anticipate that it would be so used, then it had no reason to exercise any care to make it reasonably safe as a stepping-place, and fulfilled its whole duty when it made it reasonably safe for the purpose of a shelf for which it was intended. That is where your function is required, to exercise and determine that disputed point.

In reference to the matter of the absence of the railing around the platform, the Court would say to you that of itself would not justify finding that the defendant was negligent. The platform was not elevated so high, its uses in taking up and taking down merchandise were such that the railing would not be necessary in the exercise of ordinary care, for the platform alone was what was involved. Furthermore, the absence of the railing was apparent to one working upon it, and anyone working on the platform with the railing absent would assume the risk [85—45] of the absence of the rail. It would be the same as in a barn, where you have an elevated hay mow over the stalls of the horses below. You are not obliged to put any railing around it where one goes up to get hay, because he is assumed to be able to take care of himself, under such circumstances.

But if you find that with the shelf in the position as it was and that the master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping-place, if you should thus find—further find that in order to avoid and prevent the employees using this shelf as a step, the exercise of ordinary care required the master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover.

In reference to the step, if you should find that the defendant ought to have known that its employees

were likely to use it, while that is not enough to enable you to find for the plaintiff, or to warrant you in finding for the plaintiff, unless you find that the plaintiff did use this shelf as a stepping-place,—if he, instead of stepping on it in lowering the merchandise, stepped over it and fell and some other portion of his body struck the shelf and broke it as he came down, then the negligence charged is not the cause of his injury and you would find for the defendant.

You will remember the testimony in reference to that, the plaintiff's lack of ability or apparent lack of ability to say whether he stepped on this shelf or not until at the very conclusion of the trial, when he finally said that he did.

It is for the plaintiff to prove to your satisfaction, by a preponderance of the evidence, that he did use the shelf as a stepping-place, when it broke under him, and under the circumstances you would be justified in finding a verdict for [86—46] the plaintiff.

In the matter of the orders that has been said—that has been testified that were given to him to go up on the platform, the Court, under the circumstances, is not inclined to attach any importance to this matter. The law does not attach any importance to it, for this reason, that even if the order was given, it was only to do what the plaintiff was accustomed to do and in the way he was accustomed to. It was only to go where he was accustomed to go without an order, and the order under such circumstances does not change the relation between the master and the servant. It is no inducement to the servant to do some special duty, but it is only a direction to what

otherwise he would have done, and hence it affords him no protection. It does not change the rules of law otherwise applicable, hence you can put out of mind the proposition or issue of whether or not there was an order given. It is of no materiality in this case. Furthermore, it would have to be a negligent order under the circumstances, and it is not a negligence charged in the complaint.

In permitting the plaintiff to enter into the defendant's employ, the defendant did not become the insurer of the plaintiff's safety from danger, that which under the ordinary performance of his duties he may be confronted. The only duty which the defendant owed the plaintiff in that regard was to use reasonable care in having the plaintiff's working place and appliances with which and by means of which he was required to do his work, reasonably safe for that particular use. There was a reciprocal duty which the law imposes on the plaintiff and which the plaintiff owed his employer as well, and this duty was that the plaintiff should exercise ordinary, reasonable care for his own safety and take reasonable precaution to avoid injury to himself. The master is not bound to take more care of the servant than the servant may be reasonably expected to take [87—47] for himself.

If you find from the evidence in this case, by the exercise of ordinary care, and taking reasonable precautions for his own safety in the doing of the work the plaintiff was engaged in, he could have avoided the accident, if it was the accident that resulted in his injury, then he cannot recover for such and the

verdict should be for the defendant.

You are instructed that the plaintiff had the right to assume that the defendant had furnished him a safe place to work, and to that end had exercised ordinary care and vigilance, and the risks which the plaintiff assumed were those only which were ordinarily incident to the business and which were either known to the plaintiff or were so obvious as to be readily appreciated, but the plaintiff was under no duty to make inquiry or inspect the premises where he was working to determine if they were reasonably safe, for that was the duty of the defendant, unless the plaintiff had notice or knowledge of such facts and circumstances which would indicate to any reasonably intelligent man that the presumption was that the Master had complied with his duties therein was unjustifiable, that the Master had not complied with his duties. The plaintiff was, however, bound to see and know whatever would have been seen and known by the average servant exercising ordinary care for his own safety under like circumstances whatever the average man under like circumstances and conditions ought to have seen or known and apprehended. The law conclusively presumes the plaintiff so knew and apprehended, and he will not be heard to say that he did not see, know and apprehend.

You are instructed that if you find the risk or danger from the unsupported board near the rail was as apparent to the plaintiff as to the defendant, and that each had equal opportunity and means of knowing, yet as the plaintiff had the right to rely on the

defendant for providing him a reasonably [88—48] safe place to work, and there being no duty on the plaintiff to inquire into and inspect the sufficiency and safety of the platform, he was not necessarily guilty of contributory negligence in going upon said platform and handing down said cans unless the danger was so apparent that a prudent man would not have incurred it, unless you find that in what he did he did not act as a reasonably careful and prudent man would act under like circumstances. The fact, if it be one, that it is now apparent that there was a safer way in which the work could be done is not conclusive against the plaintiff but it may be considered by you, but that itself it is not sufficient to say he was guilty of contributory negligence by doing the work as he did, or that he assumed the risk of doing the work as he did. If no particular instructions were given the plaintiff as to how he should hand down the cans, and if the plaintiff in good faith adopted a more hazardous way, and if the way chosen was one which would have been adopted *or* the ordinarily careful and prudent person under like circumstances, the plaintiff would not be guilty of contributory negligence.

If you find that the defendant was negligent as charged and that the plaintiff was not guilty of contributory negligence as you have been instructed, and if you find also that the plaintiff did not assume the risks of the situation there, and if you find that the defendant's negligence proximately resulted in the injury to the plaintiff and the plaintiff is en-

titled to recover herein, then the measure of his recovery would be an amount which would compensate him for loss of time, lessened ability to earn wages, if any, which has occurred by reason of the said injuries, together with such sum as will reasonably compensate him for his loss by reason of ability to perform manual labor, together with such further sum or amount as will fairly and reasonably compensate the plaintiff for physical pain and suffering and mental anguish already endured and such as you may [89—50] find he may be reasonably expected to suffer in the future, if any, not exceeding, however, the sum mentioned in the complaint, to wit, Twenty-five Thousand Seven Hundred Twenty-five (\$25,725) Dollars.

When you retire to your jury-room you will select a foreman and proceed to a verdict. Twelve of your number must agree on any verdict you find in this case.

By the COURT.—Gentlemen, have you any exceptions to make to the instructions?

[Exception to Certain Instructions.]

Mr. RASCH.—In order to save the point, your Honor, referred to and discussed yesterday evening, the defendant now excepts to that part and portion of the Court's charges to the jury which is to the effect that the placing of the board for the purpose of being made use of as a shelf only is not conclusive that plaintiff is not entitled to recover, but that if the defendant should have reasonably anticipated that it might be made use of as a stepping-place,

it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping-place as though it had originally been placed there for that purpose. And further, that if the defendant ought to have anticipated the likelihood of this shelf being made use of as a stepping-place, and to avoid the use of the shelf as a stepping-place ordinary care required the defendant to place a railing at that point, that then the absence of the railing was negligence, for the reason that the same is not applicable to the issues under the pleadings and is not warranted by the evidence in this case.

And thereupon the jury retired to consider of their verdict, and thereafter returned into court their verdict in favor of the plaintiff and against the defendant for the sum of Five Thousand (\$5,000) Dollars.

And thereafter on the 11th day of June, 1913, judgment was [90—51] rendered in favor of said plaintiff and against said defendant for the said sum of Five Thousand (\$5,000) Dollars, with interest thereon at eight per cent per annum from the date thereof until paid, together with plaintiff's costs and disbursements amounting to the sum of \$43.60.

And thereupon the Court made an order granting the defendant sixty days from and after the said 9th day of June, 1913, within which to prepare and serve its bill of exceptions.

And now comes the said defendant, Stone-Ordean-Wells Company, and presents this its proposed bill of exceptions in said cause and prays that the same

may be approved, settled and allowed by the Court as provided by law.

J. H. JOHNSTON and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of the foregoing proposed bill of exceptions of the defendant Stone-Ordean-Wells Company is hereby acknowledged and receipt of copy thereof accepted and admitted this 4th day of August, 1913.

NICHOLS & WILSON,
Attorneys for Plaintiff.

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated and agreed by and between the parties to said above-entitled cause that the foregoing proposed bill of exceptions is a full, true and correct bill of exceptions as to the proceedings at and the evidence adduced in said cause, and that the same contains all of the testimony and evidence adduced at the trial of said cause, and the same may be approved, settled and allowed by the Court as provided by law. [91—52]

Dated this day of, 1913.

.....,
Attorneys for Plaintiff.

.....,
Attorneys for Defendant.

**[Order Settling, Allowing and Approving Bill of
Exceptions.]**

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court of the United States, for the District of Montana, before whom the foregoing-entitled cause was tried, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action of the proceedings had, and contains all the evidence adduced at the trial of said cause and the same is now by me hereby settled, allowed and approved as true and correct bill of exceptions in said action.

Dated this 25th day of Sept., 1913.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Bill of Exceptions. Filed Sept. 25, 1913. Geo. W. Sproule, Clerk. [92—53]

Thereafter, on November 8, 1913, defendant's Assignment of Errors was duly filed herein, in the words and figures following, to wit: [93]

*In the District Court of the United States, for the
District of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Cor-
poration,

Defendant.

Assignment of Errors.

Now comes the defendant, Stone-Ordean-Wells Company, and files the following assignment of errors, upon which it will reply in the prosecution of the writ of error issued in its behalf in the above-entitled cause:

1. The United States District Court, in and for the District of Montana, erred in denying and overruling the defendant's motion made at the close of the evidence of the case to direct the jury to return a verdict in favor of the defendant.

2. The United States District Court, in and for the District of Montana, erred in charging the jury, in the instructions given by the Court, to the effect that the placing of the board for the purpose of being made use of as a shelf only was not conclusive that plaintiff was not entitled to recover, but that if the defendant should have reasonably anticipated that it might be made use of as a stepping place, it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping-place, as

though it had originally been placed there for that purpose, and which part and portion of the instructions of the court in which the jury were so charged reads as follows:

“It would appear from the facts in evidence here, that the defendant’s servants placed the board that finally broke, where it was placed, for the purpose of a shelf only. [94] The evidence is such that you could not come to any other reasonable conclusion, but that is not conclusive that the plaintiff would not be entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering the situation of the elevated platform and this shelf placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom. It is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employees were likely to step on the board; if the defendant ought to have known that the board was likely to be so used. If it should reasonably have anticipated that its servants were likely, in handing down merchandise to make use of this shelf as a stepping-place, then it would be held to the same duty to exercise

ordinary care to make it reasonably safe for a stepping place, even as though it had originally erected it for that purpose.”

3. The Court erred in charging the jury in the instructions given by the Court, to the effect that if the defendant ought to have anticipated the likelihood of this shelf being made use of as a stepping-place, and to avoid the use of the shelf as a stepping-place, ordinary care required the defendant to place a railing at that point, that then the absence of the railing was negligence, and which part or portion of the instructions given by the Court, in which the jury were so charged, reads as follows:

“But if you find that with the shelf in the position as it was and that the Master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping-place, if you should thus find—further find that in order to avoid and prevent the employees using this shelf as a step, the exercise of ordinary care required the Master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover.”

4. The United States District Court, in and for the District of Montana, erred in rendering and entering judgment in said cause in favor of the plaintiff and against the defendant, and that the said judgment is contrary to law and the facts established at the trial of said cause.

WHEREFORE, the said defendant and plaintiff in error prays [95] that the said judgment of the said District Court of the United States, in and for the District of Montana, be reversed.

J. H. JOHNSTON and
GUNN, RASCH & HALL.

Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Nov. 8, 1913. Geo. W. Sproule, Clerk. [96]

Thereafter, on November 8, 1913, Petition for Writ of Error and Order allowing same were duly filed and entered herein, in the words and figures following, to wit: [97]

*In the District Court of the United States, for the
District of Montana.*

WILLIAM A. HANSFORD,

Plaintiff,

vs.

STONE-ORDEAN-WELLS COMPANY, a Corporation,

Defendant.

**Petition for a Writ of Error and Supersedeas of the
Defendant, Stone-Ordean-Wells Company.**

Stone-Ordean-Wells Company, defendant in the above-entitled cause, feeling itself aggrieved by the proceedings had in said cause, and by the decision of the Court and the judgment entered in said cause on

the 11th day of June, 1913, for the sum of Five Thousand (\$5,000.00) Dollars damages, and the further sum of Forty-three and 60/100 (\$43.60) Dollars costs, in favor of said plaintiff and against said defendant, comes now, by J. H. Johnston and Gunn, Rasch & Hall, its attorneys, and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit. And your petitioner will ever pray.

J. H. JOHNSTON and
GUNN, RASCH & HALL,
Attorneys for Defendant. [98]

Order Allowing Writ of Error and Fixing Amount of Bond Thereon.

Upon motion of Gunn, Rasch & Hall, attorneys for the defendant, Stone-Ordean-Wells Company, the foregoing petition for a writ of error is hereby granted, and it is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein on the 11th day of June, 1913, and that the amount of the

bond on said writ of error be, and is hereby, fixed at \$7,500.00.

GEO. M. BOURQUIN,

Judge.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error and Supersedeas. Order Allowing Writ and Fixing Bond. Filed and entered Nov. 8, 1913. Geo. W. Sproule, Clerk. [99]

Thereafter, on December 2, 1913, Bond on Writ of Error was duly approved and filed herein, in the words and figures following, to wit: [100]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Stone-Ordean-Wells Company, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto William A. Hansford in the full and just sum of \$7,500.00, to be paid him, his attorneys, executors, administrators or assigns, for the payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 10th day of November, A. D. 1913.

WHEREAS, lately, at a session of the District Court of the United States, in and for the District of Montana, in an action pending in said court be-

tween William A. Hansford, as plaintiff, and Stone-Ordean-Wells Company, defendant, a final judgment was rendered against the said defendant and in favor of said plaintiff, and the said Stone-Ordean-Wells Company, defendant, having obtained from said court a writ of error to reverse the judgment in the aforesaid action, and a citation directed to said William A. Hansford is about to be issued, citing and admonishing him to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California:

NOW, THEREFORE, the condition of the above obligation is such that if the said Stone-Ordean-Wells Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said Stone-Ordean-Wells Company has caused these presents to be executed by its Treasurer [101] thereunto duly authorized, and its corporate seal to be affixed, and the said United States Fidelity & Guaranty Company has caused these presents to be executed by its attorney in fact, also thereunto duly authorized, and its

corporate seal to be affixed hereto, on this 10th day of November, A. D. 1913.

STONE-ORDEAN-WELLS COMPANY,

[Seal]

By R. A. HORR, Treasurer,

Thereunto duly authorized,

Principal.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal]

By W. P. MATHESON,

Its Attorney in Fact, thereunto duly authorized,

Surety.

[Endorsed]: Title of Court and Cause. Bond on Writ of Error. Filed Dec. 2, 1913. Geo. W. Sproule, Clerk.

The within bond is hereby approved.

Dec. 2, 1913.

BOURQUIN,

U. S. District Judge. [102]

Thereafter, on December 2, 1913, Writ of Error was duly issued herein, which said Writ is hereto annexed, and is in the words and figures following, to wit: [103]

[Writ of Error (Original)].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, in and for the District of Montana, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court, and between Stone-Ordean-Wells Company, a corporation, plaintiff in error, and William A. Hansford, defendant in error, a manifest error hath happened, to the great damage of the said Stone-Ordean-Wells Company, the plaintiff in error, as by their complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 1st day of January, 1914, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 2d day of December, in the year one thousand nine hundred and thirteen.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States, in
and for the District of Montana.

The foregoing writ of error is hereby allowed.

Dec. 2, 1913.

GEO. M. BOURQUIN,
District Judge. [104]

Service of the within and foregoing writ of error and receipt of copy thereof is hereby acknowledged this 3d day of Dec., 1913.

NICHOLS & WILSON,
Attorneys for Defendant in Error. [105]

Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, in a certain schedule to this Writ annexed, as within I am commanded.

By the Court:

[Seal]

GEO. W. SPROULE,
Clerk. [106]

[Endorsed]: No. 290. United States District Court, District of Montana. William A. Hansford, Defendant in Error, vs. Stone-Ordean-Wells Company, Plaintiff in Error. Writ of Error. Filed Dec. 5, 1913. Geo. W. Sproule, Clerk. [107]

Thereafter, on December 2, 1913, a Citation was duly issued herein, which Citation is hereto annexed, and is in the words and figures following, to wit:
[108]

Citation on Writ of Error.

The President of the United States, to William A. Hansford and Messrs. Nichols & Wilson, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, in and for the District of Montana, wherein Stone-Ordean-Wells Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 2d day of December, A. D. 1913, and of the Independence of the United States the one hundred and thirty-seventh.

GEO. M. BOURQUIN,

United States District Judge.

Service of the foregoing citation acknowledged and copy thereof received this 3d day of Dec., A. D. 1913.

NICHOLS & WILSON,

Attorneys for Defendant in Error. [109]

[Endorsed]: No. 290. United States District Court, District of Montana. William A. Hansford, Defendant in Error, vs. Stone-Ordean-Wells Company, Plaintiff in Error. Citation on Writ of Error. Filed Dec. 5, 1913. Geo. W. Sproule, Clerk. [110]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 111 pages, numbered consecutively from 1 to 111, inclusive, is a true and correct transcript of the pleadings, process, verdict and judgment, and all other proceedings had in said cause, and the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I further certify and return that I have annexed to said transcript and included in said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Twenty-one and 90/100 Dollars (\$21.90), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand

and affixed the seal of said court at Helena, Montana, this 22d day of December, A. D. 1913.

[Seal]

GEO. W. SPROULE,
Clerk. [111]

[Endorsed]: No. 2355. United States Circuit Court of Appeals for the Ninth Circuit. Stone-Ordean-Wells Company, a Corporation, Plaintiff in Error, vs. William A. Hansford, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Received and filed December 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STONE-ORDEAN-WELLS COMPANY,
a corporation,

Plaintiff in Error,

vs.

WILLIAM A. HANSFORD,

Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The defendant in error, hereinafter, for convenience, called the plaintiff, brought this action in the state court against the plaintiff in error, hereinafter referred to as the defendant, a corporation existing under the laws of the state of Maine, for the recovery of \$25,725.00 damages, on account of

personal injuries, sustained by him while in the employ of the defendant, at Billings, Montana, on the 21st day of June, 1912. The case was removed to the District Court of the United States, for the District of Montana, on the ground of diversity of citizenship of the parties (Tr. p. 21), and came on for trial on June 5, 1913, before a jury, which returned a verdict for \$5000.00 in favor of the plaintiff, and judgment having been entered upon the verdict, the defendant, claiming that error was committed at the trial of the case in the court below, brings the case here, by writ of error, for review (Tr. p. 112).

The plaintiff entered into the defendant's service on June 1, 1912, the duties of his employment requiring him to receive and distribute goods and merchandise in defendant's warehouse at Billings, and to assemble them for shipment on the first floor of the warehouse. In substance, it is alleged in his complaint that the defendant maintained a platform or staging for the storage of goods about thirty feet long and twenty feet wide, about nine feet above the first floor of the warehouse, supported by upright pillars, ten by twelve inches in size, set about ten feet apart, and was reached by means of an upright ladder from the main floor; that the platform was constructed of common pine lumber or boards, laid on two by four inch stringers, but was without railing of any kind about the outside thereof (Tr. p. 3).

That at the outer edge of the platform the defendant had placed a board about ten feet in length, and of the same kind and dimension as those used in the construction of the floor of the platform, without support, except one inch cleats fastened to the upright posts, upon which it rested (Tr. p. 3). That on June 21, 1912, the plaintiff was directed to assemble for shipment some crated coffee cans on the platform, and to hand them down to another employee, stationed on the floor below to receive them; that while he was handing down one of the cans he stepped upon the board, breaking it, and fell to the floor below, receiving the injuries complained of (Tr. pp. 3-4). It is alleged that plaintiff was at all times in the exercise of due care and caution, and that his injuries were caused by defendant's negligence in failing to provide a suitable railing along the outside edge of the platform, and in failing to provide sufficient supports under the board (Tr. p. 4).

In its amended answer the defendant admits plaintiff's employment; that while so employed he fell from the platform to the floor below, and that there was no railing around the platform, but denies that it was negligent in any of the particulars charged in the complaint. It is alleged that the board was not a part of the platform, but separate therefrom, and from three and one-half to four inches below the floor of the platform; that the

board was eleven feet long, and about ten inches wide, and placed at right angle to the boards in the floor of the platform (Tr. p. 28). It is also alleged that the board was not intended or placed there to be stepped upon by anyone, as was patent and plainly apparent from its position and the manner in which it was fastened, which the plaintiff knew, or should have known, by the exercise of any care or caution at all (Tr. pp. 28-29). In paragraph 9 of the amended answer it is alleged that plaintiff's injuries were proximately due to, and caused by, his own fault and carelessness, and in paragraph 10 the defendant pleads that the injuries were proximately due to causes the risk of injury from which he had assumed (Tr. pp. 29-32). In his replication the plaintiff denies the allegations of paragraphs 9 and 10 of the amended answer; that is to say, that the injuries were caused by his own negligence, or that they were due to causes the risk of injury from which he had assumed (Tr. p. 33).

The evidence shows substantially the following facts: The plaintiff, a man thirty years of age, entered the defendant's employ on June 1, 1912. Prior to that time he had been employed in various occupations (Tr. p. 38). The defendant's warehouse contained three floors, and most of plaintiff's work kept him on the first or main floor of the building, where he was required to receive goods and distribute them, and to get them ready for shipment as

occasion demanded (Tr. pp. 38-39). The platform was on the first floor of the warehouse, in the north-west corner of the building, extending easterly thirty feet in length and southerly twenty feet in width (Tr. p. 39). It was eight feet and one and one-half inches above the main floor (Tr. p. 70), and was used for the storing of merchandise upon it, such as spices, clothes pins, lamp chimneys and lantern globes (Tr. p. 39). Access was had to the platform by means of a ladder, located at the east end (Tr. p. 39).

On June 21, 1912, an order had been given for the shipment of some empty coffee cans, which were on the platform, their weight being about fifteen pounds each (Tr. pp. 39-40). The plaintiff either by direction of shipping clerk Russell (Tr. p. 40), or voluntarily (Tr. pp. 69, 83), went upon the platform to hand the cans down to Russell, who was standing on the floor below to receive them, and, in doing so, the plaintiff would simply take hold of the top of the can, stoop over and hand them from the edge of the platform to Russell, who would take them (Tr. p. 40). He had handed down two or three cans in that way, and then, in handing, or attempting to hand down another can, the board broke, and he fell to the floor (Tr. p. 41). He had not observed, when handing down the previous cans, whether he stepped on the board (Tr. p. 44), and when interrogated by the court, he stated that he did not remember

whether he stepped on the board when the first cans were handed down (Tr. p. 56). He had not testified, upon the completion of his testimony in chief, whether he stepped on the board when it broke, but when interrogated by the court upon that point, stated that he guessed he was on the board when it broke, but "could not say for sure" (Tr. p. 56). At the close of the case, no evidence having been introduced to show that the plaintiff was on the board when it broke, the court again interrogated him as follows:

"Q. Can you say whether you stepped on that board or whether you stepped over it?

"A. No, I cannot.

"Q. How did it break unless you stepped on it—of course that is a mere argument possibly. Has it escaped your recollection or did you ever know, so far as you now know?

"A. I had no reason to think about stepping on the board at that time.

"Q. I mean the fact that you do not seem able to recollect whether you stepped on the board or stepped over it and fell?

"A. I stepped on the board and it broke and I fell down through it." (Tr. p. 88).

The board was put up between the pillars, supported by cleats nailed to the sides of the pillars, by

some of defendant's employees in February or March, 1912, for the purpose of a shelf to put spices upon, and it was used as a shelf and for no other purpose (Tr. p. 57, 58, 63). It was from three and one-half to four inches below the floor of the platform, and no one had ever been observed to make use of it as a place to step or stand upon (Tr. pp. 65, 79). There was a large door at the west end of the platform, and a window five feet square above it, three doors to the south, and both doors and windows at the east end of the building (Tr. p. 64). The wheather was warm and the sun shining on the day the plaintiff was injured, all of the doors of the warehouse were open (Tr. pp. 64-65), the plaintiff facing one of the side doors to the south, when on the platform handing down the cans (Tr. p. 57). The passageway, used for the handling and movement of goods and merchandise, ran in front of the platform, and the plaintiff had been on the platform at least fifteen or twenty times prior to the day of the accident (Tr. p. 45-46), and had also from time to time been on the floor below, receiving goods tossed down from the platform, upon which occasions the person's vision, while waiting and looking for the articles as they were tossed or handed down, would be in the direction of the board (Tr. p. 52)). The place was well lighted, and the position of the board, that it rested upon cleats between the pillars and was not a part of the platform but

some distance below the floor of the platform, was readily observable (Tr. pp. 60-61; 65; 71-72; 79; 80). But the plaintiff never paid any attention to it (Tr. p. 47). He supposes that if a person had looked in the direction of the board, he would have seen how it was placed and fastened ((Tr. p. 48), but he never noticed it (Tr. pp. 48, 53). He does not know whether, if he had paid any attention to his surroundings, he could have seen the position of the board at a glance, but he states that he would have seen it if he had gone there and examined it (Tr. pp. 49-50).

At the close of the evidence, the defendant moved the court to instruct the jury to return a verdict in favor of the defendant, which the court denied (Tr. pp. 89-90), and instructed the jury that although it appeared, and the evidence was such, that the jury could come to no other conclusion but that the board was placed by the defendant's servants for the purpose of a shelf only, that this fact would not preclude plaintiff's recovery; that if the defendant should reasonably have anticipated and known that its servants were likely, in handing down merchandise, to make use of the shelf as a stepping place, it would then be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place as if defendant originally erected it for that purpose. The court further instructed the jury that the absence of a railing

around the platform would not of itself amount to negligence, yet if the defendant should have anticipated and known the likelihood of the shelf being used as a stepping place, and in order to avoid and prevent the employees from so using the shelf, the exercise of ordinary care required the defendant to place a railing at that point, then the absence of the railing was negligence (Tr. pp. 93-96).

ASSIGNMENT OF ERRORS.

1. The court erred in denying and overruling the defendant's motion made at the close of the evidence of the case to direct the jury to return a verdict in favor of the defendant (Tr. p. 105).

2. The court erred in charging the jury, in the instructions given by the court, to the effect that the placing of the board for the purpose of being made use of as a shelf only was not conclusive that plaintiff was not entitled to recover, but that if the defendant should have reasonably anticipated that it might be made use of as a stepping place, it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place, as though it had originally been placed there for that purpose, and which part and portion of the instructions of the court in which the jury were so charged reads as follows:

“It would appear from the facts in evidence here, that the defendant’s servants placed the board that finally broke, where it was placed, for the purpose of a shelf only. The evidence is such that you could not come to any other reasonable conclusion, but that is not conclusive that the plaintiff would not be entitled to recover, even though he may use that shelf as a standing place. It is for you to determine whether, under all the circumstances, considering the situation of the elevated platform and this shelf placed as it was, of the uses to which the platform was placed and the manner in which merchandise was taken down therefrom. It is for you to say whether the defendant ought to have known that this shelf might have been used as a stepping place by its servants when taking down merchandise from the platform to the floor below. Should the defendant have reasonably anticipated that in handing down merchandise its employees were likely to step on the board; if the defendant ought to have known that the board was likely to be so used. If it should reasonably have anticipated that its servants were likely, in handing down merchandise to make use of this shelf as a stepping place, then it would be held to the same duty to exercise ordinary care to make it reasonably safe for a stepping place,

even as though it had originally erected it for that purpose.” (Tr. pp. 105-107).

3. The court erred in charging the jury in the instructions given by the court, to the effect that if the defendant ought to have anticipated the likelihood of this shelf being made use of as a stepping place, and to avoid the use of the shelf as a stepping place, ordinary care required the defendant to place a railing at that point, that then the absence of the railing was negligence, and which part or portion of the instructions given by the court, in which the jury were so charged, reads as follows

“But if you find that with the shelf in the position as it was and that the master or defendant ought to have anticipated the likelihood of this shelf being used as a stepping place, if you should thus find—further find that in order to avoid and prevent the employees using this shelf as a step, the exercise of ordinary care required the master to place a railing at that point, then you will find that the absence of the railing was negligence, and if it contributed to the injury of the plaintiff or caused his injury, then you would find that the plaintiff was entitled to recover.” (Tr. p. 107).

4. The court erred in rendering and entering judgment in said cause in favor of the plaintiff and against the defendant. (Tr. p. 107).

ARGUMENT.

I.

The negligence charged in plaintiff's complaint, which it is alleged was responsible for his fall, and the resulting injury, was the failure of defendant to provide a suitable railing along the outside edge of the platform, and that defendant failed to provide sufficient supports under a board placed at the outer edge of said platform. The absence of a railing was admitted in defendant's answer, and nothing more was heard regarding it during the trial of the case until adverted to by the court in its instructions to the jury. There is no allegation in the complaint, and no attempt was made at the trial to show, that a railing could have been put around the platform without rendering impracticable the use of the platform for the purpose for which it was made and intended; no attempt was made to show, and it does not appear, how a railing such as would not have interfered with the use of the platform for the purpose intended, would have prevented the plaintiff from falling, and there is nothing in the case from which an inference even could have been drawn that the plaintiff would not have fallen, if such railing as the practical use of the platform for the purpose intended would have permitted had actually been constructed. There is not a scintilla of evidence that the absence of a rail-

ing had anything at all to do with the plaintiff's fall, and as the plaintiff knew that no such railing had been provided, no attempt was made at the trial to attribute his injuries to its absence. The only ground relied upon at the trial for a recovery was the absence of sufficient supports under the board which broke, causing plaintiff's fall.

With reference to the board, the complaint alleges the defendant had placed it "at the outer edge of the platform." In other words, that it was a continuation or extension of the platform and a part thereof, and the negligence charged was the failure "to provide sufficient supports under" it. The answer alleges, and the conceded and admitted facts of the case are, that the board was not a continuation or a part of the platform, but that it was suspended between the two pillars, resting upon cleats, from three and one-half to four inches below the floor of the platform; that it was put there to be used, and was used, as a shelf, and for no other purpose; that from the time it was put there until the plaintiff's fall, no one had ever been seen to make use of it as a stepping place, and its position, and the way in which it was fastened, were plain and apparent to anyone who took the pains to look at it.

The facts thus established, by admissions and proof at the trial, are the facts alleged in defendant's amended answer in defense of the case. It

may be that if the board had been placed in a position so as to invite, or its appearance mistakenly caused, its use for a purpose other than the one for which it was put up and for which it was intended, that negligence might be predicated for failure to render it sufficient for such use. But that is not the case made in plaintiff's complaint. It is not pretended that the board was not sufficiently provided with supports to serve as a shelf, but the negligence charged is that it was not sufficiently supported to serve as a part of the platform—as a place to step or stand upon. But there is nothing either in the pleadings or the proof tending to show that it was ever used for such purpose prior to the plaintiff's accident by anyone, or that there was anything deceptive or misleading in its appearance, and the position in which it was placed, which might possibly cause any one to be mistaken about its nature and purpose. The facts established at the trial, and the theory upon which the case was submitted to the jury, was not the case made in plaintiff's complaint, and what was said by the supreme court of Montana in the case of *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. pages 464, 465, is applicable here:

“The plaintiff may, if he so elects, narrow the issues to a single act of negligence, but, having done so, he must be confined in his proof

to such act. He 'cannot assert a right to go without the lines within which he voluntarily confined himself.' * * *

"Over the objection of defendants the court submitted the case to the jury upon the theory that if the defendants were shown to be negligent in any respect, the plaintiff could recover; and under this general charge the jury might well have determined that LeSage was negligent in keeping a proper lookout. In fact, it appears to us to be the only negligence which the evidence tends to prove. But that was not the negligence charged, and could not be considered. * * * Under the view of the pleading which we have taken, the theory of the case entertained by the trial court, as disclosed by the instructions given, was erroneous."

In *Perry v. Barnett*, 65 Ind. 522, the defendant was a road supervisor, and the negligence charged was that he had placed in a public highway, at a point where the same crosses a deep and dangerous bayou,

"a structure or pile of wooden timbers, intended to serve as a bridge,"

so carelessly placed there by the defendant that plaintiff's mules fell through and over the timbers, causing their death. The proof was that the

structure or pile mentioned in the complaint was a bridge built across the bayou, that it was so defectively constructed that plaintiff's mules went through, causing one to fall over the edge of the bridge upon the ice below, killing it, and injuring the other so badly that it died a few months thereafter. In reversing a judgment in favor of plaintiff, the court said:

“The theory of the complaint is, that the defendant carelessly and wilfully placed an obstruction in the highway. The evidence does not show such obstruction. * * *

“We are of opinion that the evidence did not support the cause stated in the complaint; in other words, that the complaint was not proved ‘in its general scope and meaning.’ ”

In *Shanke v. United States Heater Co.*, (Mich.) 84 N. W. 283, the complaint alleged that boards placed upon the ground for a passageway for trucks

“were unfit for the purpose, because they were uneven, unsound, rotten, unsafe and defective, by reason of which the said path or paths or passageway upon said yard became and were in a dangerous and unsafe condition.”

The boards were placed end to end, and as the

wheels of the loaded truck came to the end of a board, it would press the end more or less into the soft soil. Plaintiff and another employee were ordered on the day of the accident to wheel some castings into the defendant's shop. Plaintiff was in front of the truck, pulling it, facing the truck, and his co-employee was behind, pushing. The plaintiff, in describing the accident, testified:

“There was a board there underneath, and the wood kept digging into the ground so that it caused a hole, and as I was about to lift, to start it, the board broke. I fell to my knees, and the casting on top of me.”

He also testified that the boards looked as though they had never been used before. In sustaining the action of the trial court, directing a verdict for the defendant, the supreme court of Michigan said:

“The instruction was correct. The theory of the declaration is not that sound unused boards were not sufficient, or that the ground was soft, but the sole theory of the declaration is that the boards were uneven, unsound, rotten, unsafe and defective in consequence of which the place was unsafe. Plaintiff cannot now recover upon the theory that sound boards were not sufficiently strong, or that the ground

was unsafe, so that the ends of the board would be pressed into it by the weight upon them.”

In *Forsell v. Pittsburg and Montana Copper Co.*, 38 Mont. 403, an action for damages on account of injuries sustained because of an alleged defective hoisting engine, the plaintiff charged negligence on the part of the defendant in that

“it negligently permitted the brakes on said engine to be defective and in such condition that no man could clamp them tight enough to prevent the cage from slipping down the shaft when the cage would be placed at rest by said engineer.”

Upon the trial, the court permitted evidence to be given on behalf of plaintiff tending to show:

“that the brake used was too light for the work imposed upon it, that the hoisting engine was defective, that the exhaust from the engine was not properly connected, and the effect of the back pressure of the steam.”

Also,

“that instead of a handbrake, such as was used, a post brake should have been used.”

In reversing the judgment of the court

below, in plaintiff's favor, the supreme court, first quoting from *Pierce v. Great Fall & C. Ry. Co.*, 22 Mont. 445, said:

“In the case at bar, however, the plaintiff, instead of stating generally the failure of the defendant to exercise care in the discharge of its duties, alleged in her pleadings the particulars in which the negligence of defendant consisted. She could not recover for negligence in any other respect, for a plaintiff must stand upon the cause of action stated in the complaint.”

The court then proceeds as follows:

“That this rule is correct would seem to be too plain to require argument or citation of authorities. Our Code (Revised Codes, sec. 6532) requires the complaint to contain a statement of the facts constituting the cause of action. ‘It would be folly to require the plaintiff to state his cause of action, and defendant to disclose his grounds of defense, if in the trial either or both might abandon such grounds and recover upon others which are substantially different from those alleged.’”

As in the cases above cited, so here in the case at bar, the plaintiff failed to establish the case made in his complaint, and the motion for a

directed verdict should have been granted, for, as was said by the supreme court of Indiana, in *Feder v. Field*, 20 N. E. on page 131:

“The law is well settled that a complaint must proceed upon a definite theory; that the case must be tried on the theory constructed by the pleadings; and such a judgment as the theory warrants must be rendered, and no other or different one.”

To the same effect:

Knuckey v. Butte Electric Ry. Co., 41 Mont. 314;

Bracey v. Northwestern Improvement Co., 41 Mont. 338;

Gregory v. Chicago, M. & St. P. Ry. Co., 42 Mont. 551;

Ebsery v. Chicago City Ry. Co., (Ill.) 45 N. E. 1017;

Gardner v. Metropolitan Street Ry. Co. (Mo.) 122 S. W. 1068; 18 Ann. Cases 1166;

Pennington v. Detroit etc. Ry Co., (Mich.) 51 N. W. 634.

II.

That the board was placed between two pillars for the purpose of serving as a shelf is undisputed; in fact, the court told the jury that the evidence admitted of no other conclusion. It had never been used for anything else, and no one had ever seen it used for any other purpose. Its position and the manner in which it was fastened was perfectly plain and obvious, and the plaintiff himself admits that he could have seen it if he had taken the trouble to look at it. The only reason which he gives for not knowing, is that he never paid any attention to it. Anyone standing on the platform, giving the slightest attention to his surroundings, could see that the board was not a part of the platform, but that it was some distance below it. Young Oberweiser, a boy fifteen years old, saw it the first time he went on the platform. He had no difficulty in observing that the board was lower than the floor of the platform, and saw it as soon as he got his head above the platform. (Tr. p. 80).

If the plaintiff actually stepped on the board, as he finally told the court he did, after he had twice before stated that he did not know, he did so without using any kind of care for his own safety. The place was well lighted and everything in plain sight, and even if the plaintiff had not tak-

on the pains before this time to familiarize himself with his surroundings, the situation was such that a mere glance would have disclosed to him the position of the board. It is not claimed that he stepped on the board accidentally, or that he was forced to do so because of an emergency. There is no pretense that there was any hurry or confusion, or that he did not have full opportunity to take some little care of himself while doing the work, which was a duty which he not only owed to himself, but to his master as well. But, according to plaintiff's own story, he rendered his twenty-one days services for defendant as a mere automaton or machine, neither informing himself of the conditions which existed in the place of his employment, and where his work was daily and hourly required to be done, nor using his sight to see what could readily have been seen. He shut his eyes and went about blindly, oblivious to everything which was perfectly plain and obvious to the most casual observation. He deliberately stepped upon the board without cause or reason, with the knowledge, which the law conclusively imputes to him, notwithstanding his assertion of ignorance, that the board was not a part of the platform and was not an appliance or instrumentality that could safely be used for the purpose for which he used it. His own unexplained and inexcusable carelessness was the cause of his accident.

In the words of the supreme court of New York, in *McDugan v. New York etc. R. Co.*, 31 N. Y. Supp. 135, affirmed by the court of appeals in 155 N. Y. 631:

“The action proceeds on the postulate of a violation of a duty on the part of the defendant to the plaintiff. But to one engaging in service with knowledge of an unsafe place or appliance a master is under no obligation to alter or amend the condition of the place or appliance. By entering upon the employment with such knowledge, the servant himself assumes the hazards of the dangerous place or appliance, and if, *by due diligence the servant may ascertain the danger, but choses rather to forbear the exercise of that care, such opportunity of knowledge is the legal equivalent of knowledge. In law what a man ought to know he does know.*” (Italics ours).

Or, as was said by the supreme court of Utah, in *Palmer v. O. S. L. R. Co.*, 16 Am. Cases, on page 238:

“The ability to see was in the eye of the law, tantamount to seeing. The negligence, in such events, would consist in not seeing what ought to have been seen, and the fact whether he saw or not would not be controlling,—in fact not even essential.”

And, as was said by Mr. Justice Brewer, in *Elliott v. Chicago, etc. Ry. Co.* 150 U. S. 245, 37 Law. Ed. 1068:

“This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking ordinary precautions imperatively required of all who place themselves in a similiar position of danger.”

To the same effect:

Sours v. Great Northern Ry. Co., (Minn.)
87 N. W. 766;

Anson v. Northern Pacific Ry. Co.,
(Wash.) 87 Pac. 1057;

Gaffney v. New York etc. Ry. Co., (R. I.)
7 Atl. 284;

Wabash R. Co. v. Skiles, (Ohio) 60 N.
E. 576.

And the rule is thoroughly well settled that

making use, without necessity, of an appliance or instrumentality of the master for a purpose not contemplated or intended, causing injury, where the servant by the exercise of ordinary care should have seen or known that such use was fraught with danger, there cannot be a recovery.

McCain v. Chicago, B. & O. R. Co., (C. C. A.) 76 Fed. 125;

Quirouet v. Alabama G. S. R. Co., (Ga.) 36 S. E. 599;

Gillett v. General Electric Co., (Mass.) 72 N. E. 255;

Interstate Coal Co. v. Shelton, (Ky.) 153 S. W. 1;

The Persian Monarch, (C. C. A.) 55 Fed. 333.

III.

The court below, recognizing the rule that the master cannot be held liable for injuries caused by the unauthorized use of an appliance or instrumentality, nevertheless instructed the jury that it would not preclude a recovery in plaintiff's favor, if the defendant should reasonably have anticipated, and ought to have known, that the board was likely to be used as a place to step or stand upon,

when taking down merchandise from the platform to the floor below. We have already called attention to the fact that there is no intimation given, either in the pleadings or in the proof, that the shelf ever had been used for such purpose, or that anyone had ever been observed to make such use of it. There is no suggestion in the entire record, from beginning to end, that anything had occurred, prior to the accident in question, tending to impart knowledge, either actual or constructive, that the shelf was used as a standing or stepping place. Nor is there any claim or pretense that in its position or appearance there was anything deceptive or misleading about it, leaving room for an inference that someone might possibly conceive a mistaken or erroneous notion as to its purpose and nature. It was in plain sight from the floor below, and from the floor of the platform above. It was obvious to anyone looking at it that it was not a part of the platform, and that it rested simply on cleats, fastened to the sides of the posts or pillars which supported the platform. There was nothing in the conditions which existed, and nothing had previously occurred, to suggest to anyone the likelihood that the shelf might be mistaken for something else, or that it might be made use of to serve a different purpose.

In *Morrison v. Burgess Sulphite-Fibre Co.*, (N. H.) 47 Atl. 412, the plaintiff was injured by falling

through the canvas covering of an elevator, which was a box or trough 26 inches wide, extending at an incline of about forty-five degrees from the basement of the building to the ceiling of the fourth floor, where it turned at nearly right angle down towards the floor. It was built to lift material used in the upper story from the basement by means of a belt, to which heavy iron buckets were attached, running inside the box or trough. That part of the elevator which turned back connected with an open box and was called the "conveyor." A few feet off that end of the elevator which connected with the conveyor, and that end of the conveyor, were covered with canvas, the rest being covered with boards. At the time of the accident the canvas was so thickly covered with chips and dust that it could not be readily distinguished from the adjacent board covering, and it appeared to one facing it like flat surface of wood. Plaintiff and other employees were engaged in putting up a bridgetree in the fourth story of the building, one end of which extended over the top of the elevator. Being unable to place the bridgetree in position on account of an obstruction, the plaintiff stepped upon the canvas covered part of the elevator, intending to stand there and remove the obstruction. He lost his balance, fell upon the canvas, which gave way, precipitating him onto the elevator buckets. He had helped to build the elevator, and knew that

the man who had charge of the work intended to cover the elevator with boards, and thought that it was so covered and safe to stand upon. The defendants knew that a part of the elevator was covered with canvas, but they had not informed the plaintiff of it. In reversing the judgment in favor of the plaintiff, rendered by the trial court, the supreme court of New Hampshire said:

“If this elevator was a part of their premises, they owed him no duty to so cover it that he could safely use it as he did. They did not put the coverings on their elevators for their servants to stand on, and it did not appear that they ever before had been used in that way. A master’s duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. *McGill v. Granite Co.* (N. H.) 46 Atl. 684. If this elevator was a tool or appliance, the defendants owed the plaintiff no duty respecting it at the time of the accident, for he was then putting it to a use for which he knew it was not intended; and, although it is a master’s duty to use due care to furnish his servants tools and appliances suitable for

the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended. *Young v. Railroad Co.*, 69 N. H. 356, 41 Atl. 268. There is no force in the plaintiff's claim that the defendants set a trap for him when they covered this part of their elevator with canvas, and did not tell him of the fact; for a master sets a trap for his servant only when he invites him into a dangerous situation, or creates or suffers one to exist in a place where he knows or ought to know his servant is likely to go. *Sweeny v. Railroad*, 10 Allen. 368. The case does not show that the defendants either intended for the plaintiff to use this elevator as he did, or knew, or were in fault for not knowing, that he was likely to do so. *A person is not in fault for not knowing particular facts unless circumstances exist which would put a man of average prudence upon inquiry* (*Shea v. Railroad Co.*, 69 N. H. 361, 41 Atl. 774), and no such circumstances were shown." (Italics ours.)

In *Chicago R. I. P. Ry. Co. v. Murray*, (Ark.) 109 S. W. 549, one of the cars of the defendant company was not provided with proper standards, which were used for "the protection of material on the car, and for the protection of the employees

of the company to keep things from falling off when the cars are being switched.” The standard ordinarily used was a piece of wood six by six, cut down to four and one-half inches so as to fit in the socket on the side of the car. In place of the standard ordinarily used, angle bars had been substituted, which did not fit tightly in the sockets. On the night of the injury, the plaintiff in giving signals to the engineer when approaching some cars that were standing upon the track, had hold of the angle bar with one hand while giving signals with the other, when the angle bar turned in the socket, throwing him upon the track and inflicting the injuries complained of. There was no evidence that standards were provided in order to furnish hand holds for brakemen, and in reversing the judgment for the plaintiff, the court said:

“The purpose of the standards being to keep the material on the flat cars from falling off when the flat cars were being switched, appellant was not negligent in the matter of furnishing standards so long as the standards it provided served the purpose for which they were intended. There is no evidence in the record that the standards which were being used at the time appellee received his injury were insufficient for the purpose of keeping things from falling off the cars when they were being

switched." * * * True appellee gave the slow signal in this way, and testified that all the brakemen he ever worked with did the same thing. But this did not establish that it was a proper method, or that it was so continuous and notorious that the sompany must have known it and sanctioned it. *In the absence of proof from which such knowledge and acquiescence on the part of the company could be inferred, it would not be liable for failing to exercise ordinary care to furnish appliances that would make the methods adopted by its employes without its knowledge and acquiescence, safe.* See St. Louis, Iron M. & Sou. Ry Co. v. Caraway, 77 Ark. 405, 91 S. W. 749." (Italics ours.)

In Jayne v. Sebewaing Coal Co., (Mich.) 65 N. W. 971, the plaintiff was injured as he was taken out of the defendant company's mines by means of a cage used in a perpendicular shaft in lowering and taking out defendant's employees. The wire rope used in operating the cage was fastened to an eyebolt on the upper side of a crossbeam, extending through its center, and fastened on the under-side by a nut. The eyebolt had become loose, letting it down about three-quarters of an inch when the cage was at rest in the bottom of the shaft, and when the plaintiff stepped upon the cage, he placed

his hand around the nut, and as the cage was put in motion, the nut was drawn up crushing one of his fingers. The trial court left it to the jury to determine whether it was negligence to leave this space, and whether the plaintiff had exercised proper care in placing his hand on the nut. Reversing the judgment rendered in favor of the plaintiff, the court said:

“In our opinion the court should have directed a verdict for the defendant. The nut was not intended as a hand hold, and there was no necessity for the plaintiff to use it as such. *The defendant was not chargeable with knowledge that its employes would use the nut for that purpose.* Parties are not liable for negligence where their machinery and appliances are in proper condition for the use for which they were intended. When employes use them for a purpose and in a manner for which they are not intended, they alone are chargeable with fault, if injury results.” (Italics ours.)

To the same effect:

Graham v. Chicago, St. P. M. & O.
Ry Co., 62 Fed. 896;

Salisbury v. Press Pub. Co., (Neb.) 108
N. W. 136;

Crebarry v. National Transit Co., 28 N. Y. Supp. 291;

Felch v. Allen, 98 Mass. 572.

IV.

The court correctly instructed the jury that when the plaintiff took employment, the defendant had a right to assume that he had the reasonable skill and experience ordinarily required for such work, and that the law held the plaintiff to the exercise of reasonable care for his own safety in doing his work; that the master was not bound to take more care of the plaintiff than the plaintiff could reasonably be expected to take for himself, and that it was plaintiff's duty to take reasonable precautions to avoid injury. This is all settled law, and the law is equally well settled that the master, in providing a place for work, and in furnishing the appliances or instrumentalities with which to do the work, has the right to assume that the obligations which are imposed upon the servant will be complied with, and that he will take care of himself. As was said by the Court of Appeals in *American Bridge Co. v. Seeds*, 144 Fed. 605, page 609:

“There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natur-

al and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practical basis for the measurement of the acts, rights, or remedies of mankind.”

And as was said by the same court in *Fairbanks, Morse & Co. v. Walker*, 160 Fed. 896, page 897:

“Just as employees may rely upon the performance by the employer of his positive duty to them, so may he rely upon their exercise of ordinary care in doing their work, and neither is required to anticipate and make provisions for the other’s default.”

“When men are hired,”

says the supreme court of Pennsylvania, in *Pittsburg etc R. Co. v. Sentmeyer*, 37 Am. Rep. 684, page 686,

“something must be predicated of their judgment and prudence, and hence when the employer furnishes them with tools and appliances, which though not the best possible may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents.”

Precisely the same principle was announced in

Pulley v. Standard Oil Company, (Mo.) 116 S. W. 430, where the court, on page 431, said:

“The master is not required to have infallible judgment, and he should not be held responsible for a mistake which the exercise of reasonable care, by a competent man, would not avoid. Otherwise he would be an insurer of the safety of the servant, and all agree he is not that. Furthermore, the master, in directing that a servant perform a certain service, has a right to assume that the servant himself will exercise ordinary care in the act of performing such service, and, if more than one servant is jointly performing the service, he has a right to presume that each will act with the ordinary care of one in that situation in regard to the safety of the others. Otherwise he would be an insurer against the negligence of a fellow servant, and no one will contend that he occupies such onerous relation to his servant as that.”

What evidence is there disclosed in the record of this case which would even suggest to anyone that the shelf might be used as a place to stand or step upon? No one ever had made use of it for that purpose, or seen it so used. No one pretends to say that its position or appearance was such as to give rise to any mistaken inference or impression as

its purpose and character, nor is it claimed that there was any mistake on the part of the plaintiff, which caused him to make use of it as a place to stand or step upon. He claims that he had failed to notice the shelf, not because of his inability to see it, or want of opportunity to know all about it, but simply because he “never paid any attention to it.”

The defendant had the right to assume that the plaintiff would pay some attention to it and familiarize himself, to some extent at least, with his environments and surroundings, and act upon that assumption. The defendant was not, in the words of the supreme court of New Hampshire, in *Morrison v. Burgess Sulphite-Fibre Co.*,

“in fault for not knowing particular facts unless circumstances existed which would put a man of average prudence upon inquiry,”

and as there, so here,

“no such circumstances have been shown.”

The duty which the court, by its instructions, imposed upon the defendant was to anticipate and know that a particular thing was likely to be done, not because it had ever been done before, and not because the situation was such as to make it probable that it would be done, but it imposed such duty upon defendant to anticipate and know, by infer-

ring that defendant's servants would be derelict in their duty, and fail to exercise at least some degree of care, and by further inferring that they would make use of a shelf as a place to step or stand upon, when there was nothing by way of occurrences in the past, or in the conditions which then existed, to suggest it. The court imposed the duty upon the defendant to anticipate and know, when the only source of knowledge was inference piled upon inference and conjecture piled upon conjecture, which may not be done.

As was said by the court in *Missouri Pacific Ry. Co. v. Porter*, (Texas), 11 S. W. 324, on page 326:

“It is not admissible to go into the domain of conjecture, and to pile one presumption upon another.” (Citing *U. S. v. Ross*, 92 U. S. 284).

“Without the fact being shown,”

says the supreme court of New Hampshire, in *Cole v. Boardman*, 4 Atl. 572, on page 575.

“the jury were asked to presume that the Massachusetts suits were unjust and oppressive, and from that presumed fact to further presume that this suit is unjust and oppressive. This would be an inference from an unauthorized inference; one presumption resting on

another that rested on nothing. The law of evidence requires an open, visible connection. between the principal and evidentiary facts, and the deductions from them, and does not permit a decision to be made on groundless inferences.”

The same principle was announced by the Court of Appeals in *Cunard S. S. Co. v. Kelly*, 126 Fed. 610, on page 615 where the court said:

“The suggestion in the brief of the defendant in error that Rondino was ‘under at least a moral duty’ is insufficient. To infer, therefore, that Rondino must have been vigilant with reference to this shipment of goods, which were not then in possession of the Cunard Company, and then to interpret his testimony that he ‘made sure that the goods which went aboard the ship were really the goods deposited in the Punto Franco,’ to include ‘the fact that they went aboard the ship properly marked, and that they were goatskins or kidskins, because otherwise—presumably as his duty required—he would have observed the difference in the packing and covering and the falsification of the marks, and would at once have informed the master of the ship in reference thereto,’ is to base a presumption that Rondino must have seen the marks upon another

presumption that his duty required him to do so.”

It is manifest, therefore, that the plaintiff failed to make a case entitling him to any recovery, and the judgment should be reversed.

Respectfully submitted,

J. H. JOHNSTON, and
GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STONE-ORDEAN-WELLS COMPANY,
a corporation,

Plaintiff in Error,

vs.

WILLIAM A. HANSFORD,

Defendant in Error.

Brief of Defendant in Error.

ARGUMENT.

The errors of which complaint is made and which are referred to by plaintiff in error are three.

One arises from the refusal of the Court to sustain defendant's motion for direct verdict.

The others from two instructions (Tr. p. 105-7.)

The legal question presented by the instructions given may be stated as follows: Is the master liable where a portion of his premises are unsafe for a use made by an employee, which might reasonably have been anticipated, although not originally intended for such use, and there is no negligence on the part of the servant?

It will be admitted we believe that the defendant cannot in this case evade liability, by reason of want of knowledge, actual or constructive.

This insufficiently supported board and the want of a railing along the edge of the platform was as to the first the act of the master, and in addition had existed for so long a time as that its condition should have been known by the exercise of ordinary care—the duty of inspection.

As to the railing, it was admitted none existed.

The evidence shows that the use made of the insufficiently supported board was one which might have been reasonably anticipated. It is shown by the manner of construction and by the evidence of the witness Chadwick (Tr. p. 58) "In passing by this board on the floor be-

low, unless a person absolutely knew they would take it to be originally a part of the platform."

Thus is presented the question whether the plaintiff is to be relieved because he did not intend to have this board used to step upon or as a part of the platform.

We beg to here suggest to the Court that the board or shelf ought not properly to be considered an appliance, as the word is generally used in relation to the proposition that a master has fulfilled his duty if the appliances or instrumentalities were reasonably suitable and safe for the use intended.

While the word "appliance" has been used and construed as premises, in its generally understood meaning it has reference to tools, special machinery and devices used by employes in carrying on their labor.

The facts disclosed by the transcript shows that it was so much a part of the structure upon which plaintiff was working as to be a part of the place, which the law requires shall be reasonably safe to those who are directed to work about it.

However, even admitting for the purposes of the argument that it was an appliance or instrumentality, yet where such a condition exists as is shown here, no Court has yet held as a

matter of law that the employer is relieved from liability simply because he did not intend the alleged appliance was to be so used. The case cited by defendant, *Shea v. Railroad Company*, 46 N. H. 684 (P. 28 Arg.) recognizes the rule adopted by the trial Court.

“A master’s duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows, or ought to know, they are accustomed to use while doing it.”

In the case of *Jayne v. Sebewaing Coal Co.*, 65 N. W. 971 (Mich.) quoted by defendant the language italicized (Ar. p. 32) recognizes the very rule the Court below gave, for it is there stated that in the particular case then being considered, “defendant was not chargeable with knowledge that the employer would use the nut for that purpose.” There is no intimation that in all cases where a use of an appliance is made different from that intended, the employer is never chargeable with knowledge, or that where such knowledge is shown, either actual or constructive, he would not be liable.

The rule is clearly stated by Labatt in his

late work on master and servant (Last Ed.)

“1041—It is the duty of the master having control of the times, places and conditions under which the servant is required to labor, to guard against probable danger in all cases in which that may be done by the exercise of reasonable caution. He is therefore negligent if in the ordering of his business and the selection of his plant, he fails to provide for contingencies which are likely or not unlikely to occur.”

No one, of course, would contend that he should anticipate the injury in the precise way that it did occur, but only that some injury might result.

As stated in *Texas & c. Ry. Co. v. Carlin*, 49 C. C. A. 609, subsequently affirmed by the U. S. Sup. Court:

“The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negligence in this case produced an effect not before observed, the circumstances of which could not have been anticipated. But if it was negligence like-

ly to produce other and familiar injuries the peculiarity of the accident does not prevent liability. The extraordinary circumstances attending the injury cannot serve as a defense.”

In the instant case the board so insufficiently supported was placed by the employer and allowed to so remain where it would appear to be a part of the original platform, and so likely to be made use of as such by employees. Some danger to those at work upon the platform or in its use by employees ought reasonably to have been expected; if so, then it is no defense that defendant did not actually know of the use made, or that it did not intend it to be so used.

Whether this anticipated use might be reasonably expected by the defendant was properly submitted to the jury, for to say the least, it was a question under the evidence upon which reasonable minds might differ.

Defendant’s counsel are clearly in error in stating on page 35 of the argument:

“No one pretends to say that its position or appearance was such as to give rise to any mistaken inference or impression as to its purpose or character.”

Mr. Chadwick, who placed the board in its position and was in the employ of defendant, says: “Unless a person absolutely knew they

would take it to be a part of the platform.”

If any one has the right to complain of the Court's requirement that the particular use made of this board should have been anticipated, it is certainly not the defendant. The Court would have been clearly within the law had he stated that it was for the jury to say whether the defendant ought to have known that in the use of the shelf by the employees some injury would result by reason of its insufficient support. He did, however require the jury to find that the defendant should have reasonably anticipated that in handing down merchandise its employees were likely to step on the board.

The jury so found, and were warranted under the proof in making such finding.

If the defendant ought reasonably to have anticipated a use of this board to step upon in working on the platform or handing down bulky articles, it became the duty of defendant to place under the board sufficient support to render it reasonably safe, or to erect a railing around the edge of the platform which would have prevented its use as a stepping place. His failure to do either was negligence, and the Court so instructed.

The defendant in argument seeks to avoid the effect of its admission that no railing existed about the platform, by claiming that no evi-

dence was offered that a railing would have prevented plaintiff's stepping on the board. We need only call the Court's attention to the circumstances. Plaintiff was handing down over the edge of this platform crated coffee cans; they were bulky and weighed about fifteen pounds each. The platform was about nine feet above the floor of the warehouse. It became necessary then to step to the very edge in order to lean over and lower the can far enough to allow the employee on the floor below to get the can in his hands.

It is perfectly apparent to any person that under such circumstances a railing of any sort along the edge of the platform proper would have prevented the use of this board as a stepping place. Such a railing would not in the least have interfered with the use of the platform. It certainly does not require the statement of any witness that a rail or guard of itself would prevent the use of the board. It is so apparent on the face of it that the mere statement is of itself sufficient.

No improper burden was therefore cast upon the defendant as to the degree of care required, nor was liability of defendant recognized by the instructions upon any insufficient proof.

Not only did the Court in its instructions

state the law, but stated it in a manner more favorable to defendant that it was strictly entitled to.

II.

We here wish to briefly discuss the question of plaintiff's imputed knowledge of the risk.

The plaintiff, of course, had the right to rely upon and assume that the defendant had so performed its duties that he would not be subjected to any abnormal dangers, and that all work of construction about the premises had been prudently done.

Labatt M. & S. # 1270 and 1271.

How far he may rely on this assumption is perhaps a question for the jury. It is not his duty to make inspection, and it is only as to those dangers which are obvious and manifest, where opportunity and all the circumstances surrounding him suggest observance, that the knowledge is imputed. In this case the danger was not obvious and manifest.

In the first place the plaintiff had never before been placed in this situation. While he had been upon the platform at other times, it was to carry down articles by the ladder or pitch them down to others below. (Tr. p. 40.) At the time of the accident in question the plaintiff was carrying with both hands a bulky empty crated coffee can, weighing fifteen

pounds. His attention was directed to handing it down to his fellow employee. It does not appear therefore he should have taken notice of the danger at the time. Under these circumstances the master's liability is established so far as this element is concerned.

Ills. & St. L. Ry. Co. v. Whalen, 19
Ills. App. 116.

Sweet v. Mich. Cent. Ry. 87 Mich. 559,
49 N. W. R. 882.

Elldge v. Nat. City & C. Ry. Co. 100
Cal. 282, 34 Pac. 720.

Labatt M. & S. No. 1321.

And the fact, if it be one, that another employee who had climbed up had seen the board and observed that it was lower than the platform (the witness gave no testimony as to its support) is not conclusive.

Pruke v. South Park etc. Co. 68 Minn.
305, 71 N. W. R. 276.

Ingerman v. Moore, 90 Cal. 410, 27
Pac. 306.

In the case of *Swoboda v. Ward*, 40 Mich. 420, the plaintiff had worked in a mill for fourteen days carrying slabs from a gang saw. When injured he was walking backward carrying a plank, and he slipped back against some cog wheels. He had not been warned, never noticed them until he was hurt, and could have

seen them if he had stopped work and looked.

The Court says:

“If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something he should not have done, and the effort he was making, at the time of the accident, to remove the slab showed no want of due care on his part, but on the contrary was commendable. Even if he had known of the cogs and their unguarded condition it would not thereby conclusively follow that he could not recover.”

As already stated, the evidence shows that the usual observation given to conditions as they existed, would lead to the conclusion that the board was a part of the platform. A special inspection would have been required to have known its actual condition. This was no part of plaintiff's duty. The defendant had constructed it, had afforded no protection against it, and the plaintiff had a right to assume and act as though it were reasonably safe.

Repeated references appear in plaintiff's brief to the language of plaintiff that the reason he did not know of the condition and situation of this board was because he had “paid no attention to it.” This does not warrant the infer-

ence that he had failed to exercise ordinary care. By these words he meant, and was understood to mean by Court and jury, that he had in fact not observed it, had no occasion to do so, and had made no special inspection of it. Like all other employees, his time was constantly employed in actual manual labor. He neither had the time, nor was he under any legal obligation, to inspect defendant's premises where he was directed to work, to ascertain if they were reasonably safe. This, as already stated, he had the right to assume had been done for him by the defendant.

It is not sufficient to say, now that a serious injury has resulted, that it might have been seen by plaintiff, and that some safer way was open to have done the work. All the law requires of plaintiff was that as an employee, in view of his experience, capabilities, duties, etc., he should act as an ordinarily careful and prudent person would act under like circumstances. To this effect the jury were instructed by the Court. (Tr. p. 100.)

Counsel insist that plaintiff was a "mere automaton or machine, neither informing himself of conditions nor using his sight." That he shut his eyes and went about blindly oblivious to everything which was perfectly plain and obvious."

There is no justification for such language in this record, and its only excuse is unrestrained zeal.

It has long been the rule and of universal application, that where the evidence is of such a character that the proper inference to be drawn from it is a question with respect to which different opinions may not unreasonably be formed, the matter is one to be determined by the jury.

Labatt M. & S. # 1309 (2) and cases cited.

III.

There is some contention that the negligence shown and the case made was something other than that alleged.

It is of course true that a plaintiff will not be permitted to state one ground of negligence, and recover upon an entirely distinct ground. Such a case, however, is not presented by this record. An examination of the complaint shows a reasonably clear statement of the facts, with the grounds of negligence stated as consisting of a failure to provide this board with sufficient support, and also to provide a suitable railing along the outer edge.

It was not stated or claimed that the board was a continuation of the platform at the same level, but that this board was placed at the edge

of the platform and that it was of the same kind and dimension as those used in the platform. All these facts were established by the proof. If by reason of such construction and maintenance the place where plaintiff was called upon to work was rendered unsafe, the defendant was negligent.

It is not necessary to allege that the condition created was a pitfall, or deceptive and misleading to the employees. Such would be an averment of conclusion. The facts being stated, if it appears by the proof that a condition existed rendering the place unsafe, and that in the use thereof injury results, the defendant becomes liable, and this is true whether it is called a pitfall, a concealed danger, or an invitation to use that which was insufficiently prepared for one purpose, when intended for another use.

The case was tried and defended upon the exact issue tendered, to-wit:— the existence, created and maintained by defendant, of an unsafe place in which plaintiff was required to work.

We beg to refer briefly to some of the cases cited by defendant on this branch of the case as supporting the contention that one cause of action was alleged by plaintiff and another proved.

In *Feder v. Field*, 20 N. E. 131, from which

an excerpt was quoted, the complainant did not seek damages against all defendants, but sought damages as to some and auxiliary relief as to others on the ground of fraudulent vendees. In the Appellate Court it was contended for the first time plaintiff was entitled to damages against all.

In *Kuckey v. Butte Elec. R. Co.*, 41 Mont. 314, the plaintiff alleged an injury was received while getting off a car which had stopped, by a sudden start of the car. The plaintiff's evidence showed an acceleration of speed; that he got off while the car was in motion and before it had come to a stop.

In *Bracey et al v. Northwestern Imp. Co.*, 41 Mont. 338, the complaint alleged the injury was caused by spontaneously generated gases, while the evidence showed they were generated by fire.

In *Gregory v. C. M. & St. P. Ry.*, 42 Mont. 551, the negligence complained of was a defective appliance. The proof showed the machinery was started without giving plaintiff time to reach a place of safety.

In *Ebsery v. Chgo. City Ry. (Ill.)* 45 N. E. R. 1017, the special findings was inconsistent with the general verdict, and with the complaint.

In *Gardner v. Ry. Co.*, 18 Am. Cases 1166,

the complaint alleged a projection on the West side of a railway and that plaintiff was going South. The proof showed a projection on the East side on another track and plaintiff going North.

In *Pennington vs. Ry. Co.*, 51 N. W. R. 634, the complaint alleged the train was moving down an incline uncontrolled. The proof showed it was going up grade by order of Conductor in charge.

Citations of the above character have no relation to the question suggested in this case. The proof here exactly met the averments of the complaint, while all that any Court has ever required is that the proof substantially support the specific grounds alleged. It is submitted therefore that upon the three propositions argued, no error of which defendant has ground of complaint exists in the record.

Counsel for plaintiff are unable to attend upon the oral argument, and submit the cause upon the written brief.

Respectfully,
NICHOLS & WILSON,
Attorneys for Defendant in Error.

No. 2356

United States
Circuit Court of Appeals

For the Ninth Circuit.

PERRIS IRRIGATION DISTRICT, a Corporation,

Plaintiff in Error,

vs.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

FILED

DEC 28 1914

No. 2356

United States
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PERRIS IRRIGATION DISTRICT, a Corpora-
tion,

Plaintiff in Error,

VS.

R. B. TURNBULL, Administrator of the Estate of
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of the Southern District of California,
Southern Division.

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*In the United States District Court, Ninth Circuit, in
and for the Southern District of California,
Southern Division.*

AT LAW—No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

*Page-number appearing at foot of page of original certified Record.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Honorable Judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you, between PERRIS IRRIGATION DISTRICT, plaintiff in error, and R. B. TURNBULL, Administrator of the Estate of R. H. Thompson, deceased, defendant in error, a manifest error has happened, to the damage of Perris Irrigation District, plaintiff in error, as by complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit [4] Court of Appeals to be then and there held, and that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 15th day of August, 1913.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

Allowed this the 16th day of August, 1913.

OLIN WELLBORN,
United States District Judge.

I hereby certify that a copy of the within Writ of Error was on the 16th day of August, 1913, lodged in the Clerk's office of the said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy. [5]

[Endorsed]: No. 1143. Law. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. B. Turnbull Administrator of the Estate of R. H. Thompson, Deceased, Plaintiff, vs. Perris Irrigation District, Defendant. Writ of Error. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[6]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Citation [on Writ of Error (Original)].

United States of America, to R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased, and to Oscar Mueller and William M. Hiatt, His Attorneys:

YOU ARE HEREBY NOTIFIED, that in a certain action at law in the United States District Court in and for the Southern District of California, wherein R. B. Turnbull, Administrator of the Estate of R. H. Thompson, deceased, is plaintiff, and the Perris Irrigation District is defendant, a writ of error has been allowed on the petition of the Perris Irrigation District, defendant therein, to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, 30 days after the date of this citation, to show cause, if any there be, why the judgment and order appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS The Honorable OLIN WELLBORN,
Judge of the United States District Court for the
Southern District of California, this 16th day of Au-
gust, A. D. 1913.

OLIN WELLBORN,
United States District Judge. [7]

[Endorsed]: No. 1143. Law. U. S. District
Court, Ninth Circuit, Southern District of Cali-
fornia, Southern Division. R. B. Turnbull Admin-
istrator of the Estate of R. H. Thompson, Deceased,
Plaintiff, vs. Perris Irrigation District, Defendant.
Citation. Received Copy of Within Citation, Aug.
18, '13. Oscar C. Mueller, Wm. M. Hiatt. Filed
Aug. 18, 1913. Wm. M. Van Dyke, Clerk. By Chas.
N. Williams, Deputy Clerk. [8]

*In the District Court of the United States of Am-
erica, in and for the Southern District of Cali-
fornia.*

C. C. No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT (a Cor-
poration),

Defendant. [9]

In the Circuit Court of the United States, Ninth Circuit, Southern Division, Southern District of California.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Complaint.

The plaintiff, complaining of the defendant, alleges:

FIRST COUNT.

I.

That the plaintiff is, and at all times hereinafter mentioned, was a citizen of the City of New York, in the State of New York.

II.

That the said defendant is, and at all the times hereinafter mentioned was an irrigation district, organized, incorporated and existing under and by virtue of an Act of the Legislature of the State of California, entitled "An Act to provide for the Organization and Government of Irrigation Districts, and to provide for the Acquisition of Water and other Property, and for the Distribution of Water thereby for Irrigation Purposes," approved March 7, 1887, and the several acts passed by the said Legislature of the State of California amendatory of and supplemental to said Act, and said irrigation district

is wholly situated in the County of Riverside, State of California.

III.

That said irrigation district, at the time it was organized and incorporated, was wholly situated in the Counties [10] of San Diego and San Bernardino, State of California, but that subsequent to its said incorporation, to wit, on March 11th, 1893, and subsequent to the issuance of its bonds, the County of Riverside in said State was created, and that said district thereafter was and now is wholly within the boundaries of said Riverside County.

IV.

That said defendant, Perris Irrigation District, under and pursuant to the said Act of the said Legislature of the State of California, approved March 7, 1887, and by its Board of Directors and Officers thereunto duly authorized, on the 1st day of January, 1891, issued a bond of said irrigation district, which was and is in the words and figures following:

Bond No. 1.

United States of America.	State of California.
\$500.	\$500.

Bond of the

PERRIS IRRIGATION DISTRICT.

Total Issue: \$442,000.

Located in San Diego and San Bernardino Counties,
Cal.

FOR VALUE RECEIVED THE PERRIS IRRIGATION DISTRICT, a public corporation, duly organized and existing under and pursuant to the laws of the State of California, promises to pay to

the bearer hereof, at the office of the Treasurer of said District the sum of (\$500) Five Hundred Dollars in Gold Coin of the United States at the dates and upon the installments as follows: at the expiration of eleven years from date, five (5) per cent of said sum; at the expiration of twelve years from date, six (6) per cent of said sum; at the expiration of thirteen years from date, seven (7) per cent of said sum; at the expiration of fourteen years from date, eight (8) per cent of said sum; at the expiration of fifteen years from date, nine (9) per cent of said sum; at the expiration of sixteen years from date, ten (10) per cent of said sum; at the expiration of seventeen years from date, eleven (11) per cent of said sum; at the expiration of eighteen years from date, thirteen (13) per cent of said sum; at the expiration of nineteen years from date, fifteen (15) per cent of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the representative installment coupons hereto attached. And said district promises to pay interest on the said principal at the rate of six (6) per cent per annum, payable in Gold Coin of the United States, at the office of the Treasurer of said District semi-annually on the [11] first day of January and July of each year, upon the surrender of the respective interest coupons thereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting

in the aggregate to Four Hundred and Forty-two Thousand Dollars caused to be issued by the Board of said Perris Irrigation District, and pursuant to a vote of the electors of said District, at an election held for that purpose on the 1st day of November, 1890. The said series of which this bond is one, is composed of Eight Hundred and Eighty-four bonds, each of the denomination of Five Hundred Dollars, and said bonds are issued by authority of, and pursuant to, and after a full compliance with all the requirements of the Act of the Legislature of the State of California, entitled, "An Act to Provide for the Organization and Government of Irrigation Districts, and to Provide for the Acquisition of Water and Other Property, and for the Distribution of Water Thereby for Irrigation Purposes." Approved March 7th, 1887.

All the said bonds and the interest thereon are to be paid by revenue derived from annual tax upon real property of the district, which tax is, and the said bonds are by said Act of the Legislature made a lien upon all said real property.

IN WITNESS WHEREOF said Perris Irrigation District has caused these bonds to be issued and signed by its President and Secretary, and its corporate seal to be hereunto affixed and the lithographed signature of its Secretary to be affixed to each of said coupons at the office of the Board of

Directors in said District, this 1st day of January,
A. D. 1891.

[Corporate Seal]

PERRIS IRRIGATION DISTRICT,

By J. W. NANCE,

President of said Board.

By H. A. PLIMPTON,

Secretary of said Board.

[Endorsed]: No. 1. Bond of the Perris Irrigation District. \$500. Dated, January 1st, A. D. 1891. Interest 6 per cent per annum. Payable January 1st and July 1st.

V.

That attached to said bond is, and was at the time of the issuance thereof, as aforesaid, a certain coupon No. 16, which said coupon was and is in the words and figures following, to wit:

\$15.00

Interest Coupon No. 16.

PERRIS IRRIGATION DISTRICT.

Will pay to the bearer at the office of the Treasurer of said district in the County of San Diego, State of California, on the first day of July, 1889, on surrender of this coupon, the sum of Fifteen Dollars in U. S. Gold Coin, being semi-annual interest on Bond No. 1.

H. A. PLIMPTON,

Secretary.

~~January~~ January 1st, 1891. [12]

VI.

That at the time of the issuance of said bond and coupon thereto attached, J. W. Nance was the

President of said Board of Directors of the said Perris Irrigation District, and H. A. Plimpton was the Secretary thereof; that the signatures to said bond were and are the signatures of the said J. W. Nance and H. A. Plimpton in their respective capacities, and the signature to said coupon is and was the signature of the said H. A. Plimpton, Secretary, as aforesaid.

VII.

That subsequent to the issuance of said bond, and prior to the commencement of this action, this plaintiff did in good faith and in the ordinary course of business, and for value, before the apparent maturity of said bond, and without knowledge of its actual dishonor, purchase said bond and also the coupons thereto attached, including said Coupon No. 16, and said plaintiff ever since has been and now is the owner and holder of said bond and all coupons thereto attached.

VIII.

That at no time since the maturity of said coupons has the defendant had in its treasury any money whatever with which to pay said coupon, and has at all times neglected and refused, and still neglects and refuses, to make any levy of assessment to raise money to pay the same, and that in and by the body of said bond defendant separately promised to pay the same.

IX.

That said Coupon No. 16 has not been paid, nor has any part thereof been paid; that there is now due, owing and unpaid to the plaintiff on said

coupon the sum of Fifteen (15) Dollars, with interest thereon at the rate of seven (7%) per cent per annum from the 1st day of January, 1899. [13]

X.

That on the 28th day of March, 1901, this Court, in an action herein then pending, wherein the plaintiff herein was plaintiff and the defendant herein was defendant, being case No. 849, duly gave and made its judgment, in and by which it determined that said bonds, and each and all of them, and all of the coupons thereto attached, were legally issued and were valid obligations of the defendant to the plaintiff, and that the plaintiff has ever since continued to hold, and now holds, said bonds and all the coupons herein described.

SECOND COUNT.

And for a further separate and distinct cause of action, this plaintiff alleges:

I.

Repeats and makes a part hereof Paragraphs I, II and III of the foregoing count, and further alleges:

II.

That heretofore, to wit, on the 1st day of January, 1891, the said Perris Irrigation District, under and pursuant to said Act of the Legislature of the State of California, approved March 7, 1887, and by its Board of Directors and officers thereunto duly authorized, issued certain bonds of said irrigation district, which said bonds were of the same tenor and effect as the bond hereinbefore set forth in the first count of this complaint, with the exception of the

numbers thereof, and which said bonds were numbered respectively as follows, to wit: 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 583, 584, 585, 586, 587, 588, 589, 590, 591, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 666, 667, 668, 669, 670. [14]

III.

That there were attached to the aforesaid bonds, at the time of their issuance, and to the bond herein first described, certain interest bearing coupons, each of which was of the same tenor and effect, and made and executed in the same manner and form as the coupon specifically described in the first count of this complaint, differing only in the numbers thereof and the date of maturity; of said coupons all those hereinafter specifically described were, by the terms thereof, payable prior to the commencement of this action; that six hundred and seventy (670) of said coupons, in addition to the coupon specifically described in the first count of this complaint, were at the time of the issuance thereof, and now, are, attached to the aforesaid designated bonds, as follows, to wit, to each of said bonds, except bond No. 1 first herein described, were and are attached eleven (11) of said coupons, numbered respectively 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26; and to said bond No. 1 were and now are attached, in addition to said coupon No. 16, coupons numbered respectively 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26.

That said coupons numbered 16 were each payable

on the 1st day of July, 1899; that said coupons numbered 17 were each payable on the 1st day of January, 1900; that said coupons numbered 18 were each payable on the 1st day of July, 1900; that said coupons numbered 19 were each payable on the 1st day of January, 1901; that said coupons numbered 20 were each payable on the 1st day of July, 1901; that said coupons numbered 21 were each payable on the 1st day of January, 1902; that said coupons numbered 22 were each payable on the 1st day of July, 1902; that said coupons numbered 23 were each payable on the 1st day of January, 1903; that said coupons numbered 24 were each payable on the 1st day of July, 1903; that said coupons [15] numbered 25 were each payable on the 1st day of January, 1904; that said coupons numbered 26 were each payable on the 1st day of July, 1904.

IV.

That at the time of the issuance of said bonds and the coupons thereto attached, J. W. Nance was the President of said Board of Directors of the said Perris Irrigation District and H. A. Plimpton was the Secretary thereof; that the signatures to said bonds were and are the signatures of the said J. W. Nance and H. A. Plimpton in their respective capacities, and the signature to said coupons is and was the signature of the said H. A. Plimpton, Secretary, as aforesaid.

V.

That subsequent to the issuance of said bonds and coupons, and prior to the commencement of this action, this plaintiff did, in good faith and in the

ordinary course of business, and for value, before the apparent maturity of the said bonds or coupons, and without knowledge of their actual dishonor, purchase the aforesaid 670 coupons, in addition to the coupon hereinbefore specifically set forth in the first count of this complaint, and ever since has been and now is the owner and holder of said coupons and of the bonds to which the same, as before alleged, have at all of said times been and now are attached.

VI.

That the said coupons have not been paid, nor has any part of any one of said coupons been paid; that there is now due, owing and unpaid on said 670 coupons the sum of Ten Thousand and Fifty (\$10,050.00) Dollars, with interest thereon at the rate of seven (7%) per cent per annum from the date when each of said coupons respectively fell due. [16]

VII.

That on the 28th day of March, 1901, this Court, in an action herein then pending, wherein the plaintiff herein was plaintiff and the defendant herein was defendant, being case No. 849, duly gave and made its judgment, in and by which it determined that said bonds, and each and all of them, and all of the coupons thereto attached, were legally issued and were valid obligations of the defendant to the plaintiff, and that the plaintiff has ever since continued to hold, and now holds, said bonds and all the coupons herein described.

THIRD COUNT.

For a further separate and distinct cause of action, this plaintiff alleges:

I.

Plaintiff repeats and makes a part hereof paragraphs I, II and III of the first count herein, and paragraph II of the second count herein, and further alleges:

II.

That by the terms of said bonds, and of each of them, the same were made payable in installments, as follows, to wit: at the expiration of eleven (11) years from date five (5%) per cent of the principal sum of said bonds; at the expiration of twelve (12) years from date six (6%) per cent of said principal sum; and at the expiration of thirteen years (13) from date seven per cent (7%) of the said principal sum; and that said percentages of the principal sum now amount in the aggregate to Ninety (\$90.00) Dollars on each of said bonds, which said amount of the principal sum of each of said bonds is now due and wholly unpaid; that the total amount of the installments [17] due and unpaid upon all of said bonds is the sum of Five Thousand Four Hundred Ninety (\$5,490.00) Dollars, together with interest on said installments, at the rate of seven (7%) per cent per annum, from the time they respectively fell due.

III.

That subsequent to the issuance of said bonds, and prior to the commencement of this action, this plaintiff did, in good faith, and in the ordinary course of business, and for value, before the apparent maturity of said bonds, and without knowledge of their actual dishonor, purchase the same, and ever

since has been, and now is, the owner and holder thereof.

V.

That on the 28th day of March, 1901, this Court, in an action herein then pending, wherein the plaintiff herein was plaintiff and the defendant herein was defendant, being case No. 849, duly gave and made its judgment, in and by which it determined that said bonds, and each and all of them, were legally issued and were valid obligations of the defendant to the plaintiff, and that the plaintiff has ever since continued to hold, and now holds, all of the bonds above described in the first and second counts herein.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Fifteen Thousand Five Hundred and Fifty-five (\$15,555.00) Dollars, together with interest as aforesaid, and costs of suit.

C. C. WRIGHT,

Attorney for Plaintiff. [18]

State of California,

County of Los Angeles,—ss.

C. C. Wright, being first duly sworn, deposes and says: I am the attorney for the plaintiff in the above-entitled cause, and make this verification in his behalf; that said plaintiff is without the City of Los Angeles and State of California, to wit, in the city of New York, State of New York. I reside and have my office in the said City of Los Angeles, California, wherefore I make this verification.

I have read the complaint herein and know the contents thereof; the same is true of my own knowl-

edge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

C. C. WRIGHT.

Subscribed and sworn to before me this 29th day of December, 1904.

[Seal]

WALTER J. LUNDY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 1143. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Complaint. Filed Dec. 29, 1904. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. C. C. Wright, Rooms 354-6-8, Wilcox Building, Los Angeles, Cal., Solicitor for Plaintiff. [19]

(Summons.)

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Southern Division.*

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Los Angeles, County of Los Angeles.

The President of the United States of America,
Greeting: To Perris Irrigation District.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover the sum of \$15,555.00, of which said sum plaintiff alleges \$10,065.00 to be due and owing from the defendant, in payment of certain interest-bearing coupons all payable prior to the commencement of this action, and

Dec. 31, 1901,

subsequent to June 30, 1899, which coupons were attached at the time of their issuance to 61 bonds duly issued by the defendant on or about the 1st day of January, 1891, and which said bonds, together with the said coupons subsequently to their issuance and prior to the commencement of this action plaintiff in good faith and in the ordinary course of busi-

apparent

ness and for value before the maturity of said bonds, or of said coupons or any^A of [20] them, and without the knowledge of any defects therein, acquired and ever since has been and is now the owner

and holder thereof, and plaintiff further alleges that said coupons have not, nor has any part of any one of said coupons been paid. Plaintiff also prays judgment for interest at the rate of 7% per annum from the date when each of said coupons respectively fell due.

Plaintiff further alleges that of said sum of \$15,555.00 the sum of \$5,490 is due, for that by the terms of said bonds and of each of them the same were made payable in installments as follows, to wit, at the expiration of 11 years from date 5% of the principal sum of said bonds; at the expiration of 12 years from date, 6% of said principal sum; and at the expiration of 13 years from date 7% of the said principal sum; and that said percentages of the principal sum now amount in the aggregate to \$90.00 on each of said bonds, which said amount of the principal sum of each of said bonds is now due and wholly unpaid; that the total amount of the installments due and unpaid upon all of said bonds is the sum of \$5,490.00. Plaintiff also prays judgment for interest on said installments at the rate of 7% per annum from the time they respectively fell due; and for costs of suit; all of which more fully appears from the complaint on file in this case, to which you are hereby expressly referred.

And if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will take judgment against you for the sum demanded in the complaint, to wit, the sum of \$15,555.00, and interest and costs of suit.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of December, in the year of our Lord one thousand nine hundred and five and of our Independence the [21] one hundred and thirtieth.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY that I received the within writ on the 2d day of July, 1907, and personally served the same on the — day of —, 18—, by delivering to and leaving with W. H. Pilch, July 9, 1907, A. R. Fredericks July 20, 1907, D. McPherson, July 9, 1907, directors of the Perris Irrigation District, a corporation, said defendant named therein, a certified copy thereof, together with a copy of the Complaint, certified to by Wm. M. Van Dyke, attached thereto, W. H. Pilch and A. R. Frederick in Riverside Co., and D. McPherson in San Bernardino Co., in said district.

LEO V. YOUNG WORTH,

U. S. Marshal.

By B. H. Franklin,

Deputy.

Los Angeles, July 19, 1907.

[Endorsed]: Marshal's Doc. No. 202. No. 1143.
U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. R. H.

Thompson vs. Perris Irrigation District. C. C. Wright, Plaintiff's Attorney. Filed Jul. 25, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [22]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

R. H. THOMPSON,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

**Amended Return of Service of Complaint and
Summons.**

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY: That I received the Summons in the above-entitled action on the 3d day of January, 1907, and personally served the same on the Perris Irrigation District, the defendant therein named, by delivering to and leaving with W. H. Pilch, the President of and a member of, the Board of Directors of said Perris Irrigation District, a copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of the above-entitled court; by delivering to and leaving with A. R. Frederick, a member of the Board of Directors of said Perris Irrigation District, a certified copy of the Complaint and Summons in said ac-

tion, certified to by William M. Van Dyke, Clerk of the above-entitled court; and by delivering to and leaving with D. McPherson, a member of the Board of Directors of said Perris Irrigation District, a certified copy of the Complaint and Summons in said action, certified to by William M. Van Dyke, Clerk of above-entitled court.

I FURTHER CERTIFY: That I delivered said certified copy of the Summons and Complaint to W. H. Pilch, personally, on the 9th day of July, 1907, in the County of Riverside, State of California, and left the same with him; that I delivered said certified copy of the Summons and Complaint to A. R. Frederick, personally, on the [23] 20th day of July, 1907, in the County of Riverside, State of California, and left the same with him; that I delivered said certified copy of the Summons and Complaint to D. McPherson, personally, on the 9th day of July, 1907, in the County of San Bernardino, State of California, and left the same with him.

LEO V. YOUNGWORTH,

United States Marshal,

By B. H. Franklin,

Deputy.

[Endorsed]: No. 1143. U. S. Circuit Court, Ninth Circuit, Southern District of California. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Amended Return of Service of Complaint and Summons. Filed Sep. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. William M. Hiatt, and Oscar C. Mueller, Attorneys for Plaintiffs. [24]

[Default.]

*In the Circuit Court of the United States, of the
Ninth Judicial Circuit, in and for the Southern
District of California, Southern Division.*

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

In this action the defendant, Perris Irrigation District, having been regularly served with process, and having failed to appear and plead to, answer, or demur to the plaintiff's complaint on file herein, and the time allowed by law for answering pleading or demurring having expired, the default of said Perris Irrigation District in the premises is hereby duly entered, according to law.

Attest my hand and the seal of said Circuit Court
this 12th day of September, A. D. 1907.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 1143. U. S. Circuit Court,
Southern District of California, Southern Division.
R. H. Thompson vs. Perris Irrigation District. De-
fault. Filed Sep. 12, 1907. Wm. M. Van Dyke,
Clerk. Chas. N. Williams, Deputy. [25]

[Order Substituting R. B. Turnbull Administrator,
etc., as Plaintiff].

At a stated term, to wit, the July Term, A. D. 1911,
of the Circuit Court of the United States of
America of the Ninth Judicial Circuit, in and
for the Southern District of California, South-
ern Division, held at the courtroom thereof in
the City of Los Angeles, on Monday, the 25th
day of September, in the year of our Lord one
thousand nine hundred and eleven. Present:
The Honorable OLIN WELLBORN, District
Judge.

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Now comes Oscar C. Mueller, Esq., of counsel for
plaintiff, and suggests to the Court the death of R.
H. Thompson, plaintiff herein, whereupon, upon mo-
tion of Oscar C. Mueller, Esq., of counsel as aforesaid
for plaintiff, it is ordered that R. B. Turnbull, ad-
ministrator of the estate of R. H. Thompson, de-
ceased, be, and he hereby is substituted for R. H.
Thompson as plaintiff in said action; it is further
ordered, on motion of Oscar C. Mueller, Esq., of
counsel as aforesaid for plaintiff, that the firm of
Flint, Gray & Barker be, and said firm hereby is.
associated with Oscar C. Mueller, Esq., and William

M. Hiatt, Esq., as attorneys for the plaintiff.

[Endorsed]: No. 1143. United States District Court, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Copy of Order. Filed Feb. 18, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [26]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Judgment.

Comes now the plaintiff in the above-entitled action and applies for the relief demanded in its complaint filed herein; and it appearing to the satisfaction of the Court that the summons and complaint in this action have been duly and regularly served upon the defendant, Perris Irrigation District; that the legal time for the appearing and answering said complaint has expired and that said defendant has failed to appear and answer said complaint or *demurrer* thereto, and that the default of said defendant has heretofore been duly and regularly entered according to law;

IT IS HEREBY ORDERED that judgment be entered against said defendant, Perris Irrigation District, and in favor of plaintiff in accordance with the prayer of plaintiff's said complaint on file herein.

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiff herein do have and recover from the defendant, Perris Irrigation District, the sum of \$15,262.20 principal, and [27] \$11,746.08 interest, in all the sum of \$27,008.28, together with plaintiff's costs herein taxed at \$——, and that this judgment bear interest at the rate of seven (7) per cent per annum from the date of its entry.

Judgment entered February 18, 1913.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: (Original.) No. 1143. United States District Court, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Copy Judgment. Filed Feb. 18, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, 824 I. N. Van Nuys Building, 210 West 7th Street, Los Angeles, Cal., Solicitor for Plaintiff. [28]

[Certificate of Clerk U. S. District Court to
Judgment-roll.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

C. C. No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action and recorded in Judgment Book No. 2 of said Court for the Southern Division, at page 195 thereof, and I further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

Attest my hand and the said District Court, this
18th day of February, A. D. 1913.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: C. C. No. 1143. In the District Court of the United States for the Southern District of

California, Southern Division. R. B. Turnbull, Admr. of Estate of R. H. Thompson, Decd., vs. Perris Irrigation District. Judgment-roll. Filed February 18th, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register Book No. 2, Page 195. [29]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California.*

Clerk's Office.

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Praeceptum to Enter Default.

To the Clerk of said Court:

Sir: The defendant, Perris Irrigation District, having failed to appear and answer the plaintiff's Complaint herein, and the time for answering having expired, you will therefore enter the default of said defendant herein according to law.

Dated September 3, 1907.

OSCAR C. MUELLER,

WILLIAM M. HIATT,

Attorneys for Plaintiff.

[Endorsed]: No. 1143. U. S. Circuit Court, Ninth Circuit, Southern District of California. R. H.

Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Praecipe for Entering Default. Filed Sep. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [30]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Notice of Motion to Set Aside Service of Summons.

To R. B. Turnbull, Substituted as Plaintiff for R. H. Thompson, and to Oscar C. Mueller and William M. Hiatt, Attorneys for Plaintiff:

YOU ARE HEREBY NOTIFIED that the Perris Irrigation District, by its attorneys, John D. Works, Bradner Lee, Lewis R. Works and Frank W. Stafford, will appear in said court on June 17, 1912, specially for the purposes set out in the motion, and file said motion to set aside the service of summons in the above-entitled action on the ground that the Perris Irrigation District has never been served with summons in said action, nor has it ever entered appearance, accepted service or waived the service of summons in said action.

Said motion is made upon the records, files and proceedings of said court, in said action, together

with the motion to set aside the service of summons and the affidavits thereto attached.

JOHN D. WORKS,
BRADNER LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
Attorneys for Defendant. [31]

[Endorsed]: No. 1143. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion to Set Aside Service of Summons. Received copy of the within Jun. 6, 1912. Oscar C. Mueller, William M. Hiatt, Attys. for Plff. Filed June. 6, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bradner Lee, Frank W. Stafford, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [32]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Motion to Set Aside Service of Summons.

Now comes the defendant and enters appearance,

specially, in the above-entitled action, for the purpose of this motion only, and for no other purpose, and moves the Court to set aside the service of summons in said action, on the following grounds, to wit:

I.

That the persons served with summons in said action were not directors of the Perris Irrigation District at the time of service of summons on them in said action, and reference is made to the affidavits hereto attached and are made a part of this motion and to the law governing the Perris Irrigation District and irrigation districts in the State of California, at page 262, of Statutes and amendments to the codes of California of 1897, which statute in part reads as follows:

“Sec. 26. A Director shall be a resident and freeholder of the irrigation district, but not necessarily of the division for which he is elected.” [33]

The Political Code of California provides in Sec. 996, VACANCIES, HOW THEY OCCUR.—An Office becomes vacant on the happening of either of the following events before the expiration of the term:

(Subd.) 3. “His resignation.”

(Subd.) 5. “His ceasing to be an inhabitant of the State, or, if the office be local, of the district, county, city, or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged.”

(Subd.) 7. "His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the State by permission of the legislature."

II.

That the summons was not served as required by Section 411, of Code of Civil Procedure, of the State of California, which provides as follows:

The summons must be served by delivering a copy thereof as follows:

(Subd.) 1. "If the suit is against a corporation formed under the laws of this State; to the president or other head of the corporation, secretary, cashier or managing agent thereof."

III.

That the Complaint in said action was filed December 29, 1904, and the summons was executed by the clerk of said court on the 16th day of December, 1905, that said summons was received by the United States Marshal on July 2, 1907, and was attempted to be served July 9, 1907, on certain persons alleged to have been directors of the Perris Irrigation District. That the summons was not issued within one year to any person able and authorized to serve the same, and if such summons was issued to some person able and authorized to serve the same within said year, then it is not shown that due diligence was used to procure service of said summons within sixty days after the issuance of the said summons. [34]

That the said motion is made upon the records, files and proceedings in said court, in said action, and affidavits hereto attached.

WHEREFORE, the defendant moves the Court to set aside the service of summons in said action.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
Attorneys for Defendant. [35]

**Affidavit [of H. M. Harford in Support of Motion
to Set Aside Service of Summons].**

State of California,
County of Riverside.

H. M. Harford, of lawful age, first being duly sworn, deposes and says that he has been a resident of Perris and the Perris Irrigation District of Riverside County, California, since December 5, 1900, that he was well acquainted with D. McPherson, a former resident of Perris, and that said D. McPherson removed from Perris to Victorville, California, sometime prior to October, 1906.

H. M. HARFORD.

Subscribed and sworn to before me this 3d day of June, 1912,

[Seal] W. W. STEWART,
Notary Public in and for said County of Riverside,
State of California. [36]

**[Affidavit of Geo. H. Sawyer in Support of Motion
to Set Aside Service of Summons.]**

State of California,
County of Riverside,—ss.

Geo. H. Sawyer, being first duly sworn on oath, says that he is a resident of the City of Riverside, County of Riverside, State of California; that he formerly was a resident in the Perris Irrigation District in said County; that he is personally acquainted with Duncan McPherson, also known as D. McPherson; that he was acquainted with the said Duncan McPherson during the period when the said Duncan McPherson was a resident of the Perris Irrigation District in said County; that the said Duncan McPherson left the said Perris Irrigation District on or about December, 1904, and went to reside in Los Angeles County, where he remained for a short period only, and afterwards removed to Victorville, in San Bernardino County, where he is still a resident.

And further affiant says not.

GEO. H. SAWYER.

Subscribed and sworn to before me this 4th day of June, 1912.

[Seal]

K. D. HARGER,
Notary Public. [37]

**[Affidavit of Edith C. Frederick in Support of
Motion to Set Aside Summons.]**

State of California,
County of Riverside,—ss.

Edith C. Frederick, being duly sworn, on her oath says: That she was the wife of A. R. Frederick of Riverside County, California, from the year 1895 until 1905; that immediately after the marriage of affiant with A. R. Frederick he conveyed to her certain parcels and tracts of real estate in the Perris Irrigation District, County of Riverside, State of California, and that the said A. R. Frederick never owned or had any legal interest in any real property within the limits of the Perris Irrigation District other than that so conveyed to this affiant until this affiant in the year 1906, after she had been divorced from said A. R. Frederick, conveyed the said real estate heretofore mentioned to the said A. R. Frederick; that on or about December, 1904, or January, 1905, the said A. R. Frederick removed from the Perris Irrigation District and took up his residence at a point in Riverside County, outside of said Perris Irrigation District, known as Good Hope Mine; that thereafter the said A. R. Frederick removed to the town of Lake View, which is without the boundaries of the Perris Irrigation District, in the said County of Riverside, and that said A. R. Frederick beginning at the time stated was not a resident of the Perris Irrigation District for more than one year, and to the best of affiant's knowledge and belief he did not

again become a resident of Perris Irrigation District for a considerable period of time thereafter, and that the said A. R. Frederick has been absent subsequent to his return to Perris Irrigation District as aforesaid, and has left the said District and remained away from said District for long periods of time; and further affiant saith not.

EDITH C. FREDERICK.

Subscribed and sworn to before [38] me this 4th day of June, 1912.

[Seal]

K. D. HARGER,
Notary Public in and for Riverside County, State of
California. [39]

**Affidavit [of A. R. Frederick in Support of Motion
to Set Aside Summons].**

State of California,
County of Riverside,—ss.

A. R. Frederick, being duly sworn, on his oath states: That on July 7, 1902, and for several years prior thereto he was not the legal owner of any real estate within the boundaries of the Perris Irrigation District, in the County of Riverside, State of California, nor was he such owner until the year 1906, when by conveyance he received a legal title to certain parcels of real property in the said District; that on July 7, 1902, he was a resident of the Perris Irrigation District in the County of Riverside, State of California, and continued to be such resident until the latter part of 1904 or the first months of 1905, when he removed from Perris Irrigation District and resided without the said Perris Irrigation District

for a period of more than one year;

That he was appointed a Director of the Perris Irrigation District on or about July 7, 1902; that no lawful meeting of the Board of Directors appointed at said date, viz., W. H. Pilch, D. McPherson and this affiant, was held, no Secretary was appointed, nor did this affiant or any of the other Directors after the year 1902 within his knowledge ever believe that they were authorized nor did they perform any duty required of them by law as Directors of the said Perris Irrigation District, and did at all times refuse to perform any official acts after the year 1902; and this affiant did specifically deny the fact that he was such Director to the Deputy United States Marshal at the time of serving of Summons upon him in the actions now pending, said service being made in July, 1907; that to the best of affiant's knowledge and belief he was at that time residing in Riverside County, but without the boundaries of the Perris Irrigation District. And further affiant saith not.

A. R. FREDERICK.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal]

H. M. HARFORD,
Notary Public in and for the County of Riverside,
State of California. [40]

**[Affidavit of K. D. Harger in Support of Motion to
Set Aside Summons.]**

State of California,
County of Riverside,—ss.

K. D. Harger, being first duly sworn on oath, says

that he is Secretary of The Riverside Abstract Co., a Corporation with its principal place of business at Riverside, California; that as such Secretary he is competent to make the following affidavit, and does make the following affidavit on behalf of said corporation; that the business of said corporation is that of examining the records of Land Titles in said County; that he has examined the records of Riverside County for the purpose of determining whether or not Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them, was ever a freeholder in said county, and for the purpose of determining by said records what land, if any, the said Wm. H. Pilch, Duncan McPherson and A. R. Frederick, or either of them, ever owned in the Perris Irrigation District situated in said county; when they owned said land, if any, and when they disposed of same.

Further affiant says that the examination of said records reveals the following state of facts:

Wm. H. Pilch on Oct. 2, 1894, purchased from Julia A. Chandler and others, Lots 4, 5 and 12 in Chandler's Subdivision of the N. E. quarter of Sec. 13, T. 4 S., R. 4 W., S. B. B. & M. The deed given was recorded on Aug. 3, 1894, in Book 21 of Deeds, at page 107, Riverside County Recorder's Office.

The said Wm. H. Pilch on Oct. 15, 1894, conveyed all of the above-described land to Mrs. Ruth E. Pilch,
[41]

Duncan McPherson purchased on March 29, 1892, from Louis L. Newerf and wife lot 5 in Newerf's Subdivision in Sec. 6, T. 5 S., R. 3 W., S. B. B. & M. Said deed was recorded July 16, 1894, in Book

17 of Deeds, at page 85.

Said Duncan McPherson sold the above-described parcel of land to Thomas J. Robinson, July 31, 1899, and said deed was recorded Aug. 3, 1899, in Book 78 of Deeds, at page 189.

Said Duncan McPherson purchased from W. A. Bingham and wife, and John H. Lee and wife, by deed dated Sept. 12, 1901, the N. W. quarter of the S. E. quarter and the S. W. quarter of the S. E. quarter and the south half of the S. E. quarter of the S. E. quarter and the N. W. quarter of the S. E. quarter of the S. E. quarter, all in Sec. 32, T. 4 S., R. 3 W., S. B. B. & M.

Said deed was recorded March 8, 1902, in Book 118 of Deeds, at page 166. Said Duncan McPherson sold said land to C. I. Ritchy by deed dated March 7, 1902, and recorded March 8, 1902, in Book 132 of Deeds, at page 247.

A. R. Frederick purchased from the Perris Land Co. by deed dated Nov. 11, 1893, all of lot 1, in Block 20 of the Riverside Tract. Said deed was recorded Nov. 17, 1893 in Book 80 of Deeds, at page 113. Said A. R. Frederick sold said parcel of land to M. L. Lawrence by deed dated Nov. 30, 1893, and recorded Feb. 21, 1894, in Book 10 of Deeds, at page 226.

Said A. R. Frederick purchased a second time Lot 1, in Block 20, Riverside Tract from Edith C. Frederick by deed dated April 25, 1906, and recorded April 25, 1906, in Book 225 of Deeds, at page 10. [42]

Said A. R. Frederick sold said last described parcel July 20, 1907, to V. A. Lawrence, which deed was

recorded July 22, 1907, in Book 250 of Deeds, at page 11.

Said A. R. Frederick purchased from Edith C. Frederick by deed dated Oct. 5, 1906, all of lots 23, 24 and 25 in Block 4 of the town of Perris, and lots 4, 5 and 6 in Block 1 of Blethen's Addition to Perris, which deed was recorded Oct. 5, 1906, in Book 225 of Deeds, at page 330. Said A. R. Frederick sold said lots 23, 24 and 25 above described to Alexander T. Crane by deed dated April 20, 1907, and recorded May 13, 1907, in Book 240 of Deeds, at page 86.

Said A. R. Frederick sold Lots 4, 5 and 6 in Block 1, above described, to Aurilla D. Thompson by deed dated Aug. 6, 1907, and recorded Aug. 9, 1907, in Book 242 of Deeds, at page 303.

Further this affiant says that the foregoing constitutes all of the land that the said Wm. H. Pileh, Duncan McPherson and A. R. Frederick, or either of them, ever owned in the Perris Irrigation District in said County, as shown by said records, subsequent to the formation of Riverside County June 5th, 1893.

K. D. HARGER.

Subscribed and sworn to before me this 3d day of June, 1912.

[Seal]

RAYMOND BEST,
Notary Public.

[Endorsed]: No. 1143. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Motion to Set Aside Service of Summons. Received copy of the within this 6th day of June, 1912. Oscar C. Mueller, Will-

iam M. Hiatt, Attys. for Plff. Filed Jun. 6, 1912.
Wm. M. Van Dyke, Clerk. By Chas. N. Williams,
Deputy Clerk. Bradner W. Lee, Frank W. Stafford,
John D. Works, Lewis R. Works, Attorneys at Law,
Suite 821 H. W. Hellman Bldg., Los Angeles, Cal.,
Solicitors for Defendant. [43]

*In the District Court of the United States, Ninth Cir-
cuit, Southern District of California, Southern
Division.*

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Notice of Motion [to Dismiss Action].

To the Plaintiff and to Oscar C. Mueller and W. M.
Hiatt, Attorneys for Plaintiff:

Now comes the defendant in the above-entitled ac-
tion and enters appearance, not generally but spe-
cially, and for the purpose of the motion herein men-
tioned and not otherwise.

You will please take notice that on Monday, the
24th day of June, 1912, at 10:30 o'clock A. M., of
said day, or as soon thereafter as counsel may be
heard, the defendant will move the said Court for an
order dismissing the above-entitled action.

The said motion will be made upon the records,
files and proceedings in said action and upon the
written motion, copy of which is served upon you

herewith, and upon the following grounds:

1. That the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [44]

2. That the said records, files and proceedings affirmatively show and such is the fact, that the plaintiff failed "to make a *bona fide* effort to procure service of summons upon the defendant" in said action "within sixty (60) days after the issuing thereof," as required by said Rule 7.

JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
FRANK W. STAFFORD,
WORKS & JORDAN,
Attorneys for Defendants. [45]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Motion [to Dismiss Action].

Now comes the defendant in the above-entitled action and enters appearance, not generally but specially, for the purpose of this motion only, and not otherwise, and moves the Court for an order dismissing the above-entitled action.

The said motion is made upon the records, files and proceedings herein, pursuant to the notice of motion served upon you herewith, and upon the following grounds:

1. That the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

2. That the said records, files and proceedings affirmatively show and such is the fact that the plaintiff failed "to make a *bona fide* effort to procure service of summons upon the defendant" in said action "within sixty (60) days after the issuing thereof," as required by said Rule 7.

JOHN D. WORKS,

BRADNER W. LEE,

LEWIS R. WORKS,

FRANK W. STAFFORD,

WORKS & JORDAN,

Attorneys for Defendants. [46]

[Endorsed]: No. 1143. U. S. District Court, Ninth Circuit, Southern District of California, Southern

Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion and Motion. Received copy of the within notice June 19, 1912. Oscar C. Mueller, per F. Strubber. Filed Jun. 19, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bradner W. Lee, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal. Frank W. Stafford, Works and Jordan, Solicitors for Defendants. [47]

*In the United States District Court, Ninth Circuit
Southern District of California, Southern Division.*

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit [of Oscar C. Mueller].

State of California,
County of Los Angeles,—ss.

Oscar C. Mueller, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that the complaint in said action was filed December 29th, 1904; that the summons in said action was duly issued by the Clerk of this Court on December 16th, 1905; that the Hon. C. C. Wright was the attorney for the plaintiff in said action and appeared as such attorney at the time of the filing of said complaint herein, and

continued as the attorney for the plaintiff in said action until his death, January 18th, 1906; that thereafter affiant was substituted as one of the attorneys for the plaintiff in said action and has continued ever since, to be and now is, one of the attorneys for said plaintiff in said action; that he inquired of the Hon. John D. Works, one of the attorneys now appearing for the defendant in said action, as to who were the officers of the said defendant District; that said Hon. John D. Works had theretofore represented said Perris Irrigation District in another action brought in the Circuit Court of the United States for the Southern District of California, by said plaintiff against [48] said defendant, which action had theretofore been tried and judgment entered and had been appealed and the judgment affirmed by the United States Court of Appeals, Ninth Circuit; that said Hon. John D. Works informed affiant that he did not know who are the officers of the District; that he did not know where the minute-books or records of the District could be obtained, and that he did not know where the information which affiant desired could be obtained; that thereafter, and in early part of the year 1907, affiant made a trip to the town of Perris, situated within the limits of said defendant District; that he inquired of many persons living there, who the officers of the District were, but could obtain no information concerning the same; that affiant employed the Pinkerton Detective Agency to make an investigation for the purpose of learning who were the officers of said defendant District; that after such investigation, which investigation covered

a considerable period of time, said detective agency gave affiant the names and residences of three of the persons, to wit, W. H. Pilch, Duncan McPherson and A. R. Frederick, who were reputed to be the directors of said defendant District, and reported that said W. H. Pilch was reputed to be the President of said District; that from the time affiant became one of the attorneys for the plaintiff in said action, until just prior to the time the summons in said action was delivered to the United States Marshal for service, affiant was making every effort to learn who were the officers of said defendant District, and who was the President of said District, and the person upon whom such service should be made; that during said time whenever he met any person residing in said District, or who had resided in said District, or whom he thought by any chance might have knowledge of who were the officers of said District, he inquired concerning such officers, but [49] was never able to get any such information until prior to the delivery of said summons to said United States Marshal for service; that during said time he inquired and endeavored to obtain such information from a very large number of people; that the plaintiff in said action resided in the city of Brooklyn, in the State of New York; that said plaintiff informed affiant that he had no knowledge concerning who were the officers of said District.

OSCAR C. MUELLER.

Subscribed and sworn to before me this 12th day of July, 1912.

[Seal] ANNA M. McGREW,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires January 26, 1915.

[Endorsed]: No. 1143. United States District Court, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. The Perris Irrigation District, Defendant. Affidavit. Received copy of the within affidavit this 12 day of July, 1912. Lewis R. Works, L. R. C., Solicitor for Defendants. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Oscar C. Mueller, 404-452-4-6 Wilcox Building, 206 South Spring St., Los Angeles, Cal., Solicitor for Plaintiff. [50]

*In the United States District Court, Ninth Circuit,
Southern District of California, Southern Division.*

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit [of William M. Hiatt].

State of California,

County of Los Angeles,—ss.

William M. Hiatt, being first duly sworn, deposes and says: That he is one of the attorneys for the

plaintiff in the above-entitled action; that after becoming one of such attorneys and until about the time of the delivery of the summons in said action to the United States Marshal for service, he made inquiry of all persons whom he met and whom he thought might have knowledge of the affairs of said defendant District, but that no person of whom he so inquired could give or would give affiant any information concerning who were the officers of said defendant District; and that he was unable to learn who was the President of the Board of Directors of said defendant District until within a short time prior to the service of the summons in said action; that on or about the first day of May, 1907, affiant went to the town of Perris situated within the limits of said defendant District, for the purpose of endeavoring to learn who were the officers of said defendant District, and for the purpose of endeavoring to locate and obtain inspection of the minute-books of said defendant District; that he inquired of Mr. Hook, one of the firm of Hook Bros. engaged in business in said town, but that said Mr. Hook could not or would not give affiant the name of any director or officer of said defendant District; that affiant also inquired of Mr. Hook where the [51] minute-books of said District could be found and said Mr. Hook informed affiant that he did not know where the minute-books of said District were or where they could be found, or who could give any information concerning the whereabouts of said minute-books; that he also inquired of a Mr. Gates, a Justice of the Peace residing in said town, but that said Mr. Gates could not

or would not give affiant any information concerning who were the officers of the District or concerning any of the records of the District; that affiant inquired of a number of other persons residing in said District, whose names affiant does not now remember, but that affiant was unable to obtain from any person any information as to who were the directors of said District, or who was the President of said District, or who was the Secretary of said District; or as to the whereabouts of the minute-books of said District; that affiant requested the Riverside Abstract Company to make a search of the records of the County Recorder's office of the county of Riverside, the same being the county within which said defendant District is situated, and to make a report to affiant giving the name of every person who had ever filed, in said recorder's office, a bond as a director of said District; that from the report of said Riverside Abstract Company, received by affiant pursuant to such request, it appeared that A. R. Frederick, W. H. Pilch and Duncan McPherson were the last persons to file in said Recorder's office, bonds as directors of said District.

WILLIAM M. HIATT.

Subscribed and sworn to before me this 13th day of July, 1912.

[Seal]

L. B. BINFORD,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 1143. In the United States District Court, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plain-

tiff, vs. Perris Irrigation District. Affidavit. [52]
Rec'd copy. Lewis R. Works, L. R. C. Filed Aug.
31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N.
Williams, Deputy Clerk. Oscar C. Mueller, William
M. Hiatt, Attorneys for Plaintiff. [53]

*In the United States District Court, Ninth Circuit,
Southern District of California, Southern Divi-
sion.*

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit [of Oscar C. Mueller].

State of California,

County of Los Angeles,—ss.

Oscar C. Mueller, being duly sworn, deposes and
says: That he is one of the attorneys for the plaintiff
in the above-entitled action; that he has inquired
of Lewis R. Works, one of the attorneys for the de-
fendant, in reference to the whereabouts of the
minute-books of the defendant; that said Lewis R.
Works produced and allowed affiant to inspect one
book, which purported to be a volume of the minutes
of said defendant, and informed affiant that other
volumes of said minutes were in the custody of
Layfayette Gill, an attorney at law, having an office
at Riverside, California; that affiant, on the 26th
day of June, 1912, went to Riverside, California, and
to the office of said Layfayette Gill, and was there

shown two books purporting to be minute-books of said defendant; that none of the books shown to affiant contained the minutes of any meetings of the Board of Directors of the Perris Irrigation District, subsequent to the year 1893; that affiant does not know where the books containing the records of the proceedings of said Board of Directors of said defendant District, subsequent to the year 1893, are to be found, although he has made diligent inquiry for the same; that affiant while at Riverside, on said 26th day of June, 1912, examined the papers and files in the office of the County Clerk [54] of said county, in an action entitled, "J. C. Cullen, Plaintiff, vs. The Perris Irrigation District, Defendant," No. 2701, in the Superior Court of said County; that said action was commenced in the Superior Court of the City and County of San Francisco, State of California; that the Summons in said action, as shown by the return endorsed thereon, was served on W. H. Pilch, President of the Perris Irrigation District, on the 10th day of April, 1903, by the Sheriff of said county of Riverside; that said Perris Irrigation District appeared in said action by Lafayette Gill, its attorney, and filed a notice of motion and motion to change place of trial, accompanied by the affidavit of W. H. Pilch, as President of said defendant District, and that thereafter an order was duly made by said Superior Court of the City and County of San Francisco, transferring said action to the Superior Court of the County of Riverside, State of California; that a copy of a certified copy of the summons in said action, together with the return of ser-

vice endorsed thereon, is attached to this affidavit and marked Exhibit "A"; that a copy of a certified copy of the Notice of Motion, and Motion to Change place of Trial, and Affidavit of W. H. Pilch, filed in said action, are hereto attached and marked Exhibit "B." That a copy of a certified copy of the verification of W. H. Pilch, President of defendant District in case of Leeman vs. Perris Irrigation District, is attached hereto and marked Exhibit "C."

OSCAR C. MUELLER.

Subscribed and sworn to before me this 20 day of July, 1912.

[Seal]

ANNA M. MCGREW,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires January 26, 1915. [55]

**Exhibit "A" [to Affidavit of Oscar C. Mueller—
Summons in Cullen vs. Perris Irrigation Dis-
trict].**

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT (a Cor-
poration),

Defendant.

Action brought in the Superior Court of the City and County of San Francisco, State of California, and the Complaint filed in the office of the Clerk of the said City and County of San Francisco.

JOHN R. AITKIN,
Attorney for Plaintiff.

The People of the State of California Send Greeting
to The Perris Irrigation District (a Corporation), Defendant.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the City and County of San Francisco, State of California, within ten days after the service on you of this summons, if served within this county; or within thirty days if served elsewhere.

And you are hereby notified unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the City and County of San Francisco, State of California, this 2d day of July, A. D. 1900.

[Seal]

WM. A. DEANE,
Clerk.

By E. M. Thompson,
Deputy. [56]

Sheriff's Office,
County of Riverside,—ss.

I hereby certify that I received the within Summons on the 9th day of April, A. D. 1903, and personally served the same on the 10th day of April, 1903, on W. H. Pilch, President of the Perris Irrigation District, being the defendant named in said Summons by delivering to said defendant personally, in the county of Riverside, a copy of said Summons attached to a copy of the Complaint in the action therein mentioned.

Dated April 10th, 1903.

P. M. COBURN,
Sheriff.
By Z. T. Brown,
Deputy.

[Endorsed]: No. 2701. Superior Court, City and County of San Francisco, State of California. J. C. Cullen, Plaintiff, vs. The Perris Irrigation District, Defendant. Summons. Received April 9, 1903. P. M. Coburn, Sheriff. By L. A. Coburn, Deputy. Filed, April 14, A. D. 1903. Albert B. Mahory, Clerk. By F. J. Dugan, Deputy. John R. Aitkin, Attorney for Plaintiff.

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said county, hereby certify the foregoing to be a full, true and correct copy of the Summons in case of J. C. Cullen vs. The Perris Irrigation District, a corporation, on file in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal this 26th day of June, A. D. 1912.

A. B. PILCH,
Clerk.

By Chas. O. Reid,
Deputy Clerk. [57]

**Exhibit "B" [to Affidavit of Oscar C. Mueller—
Notice of and Motion to Change Place of Trial
in Cullen vs. Perris Irrigation District.]**

No. 2701.

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,
Defendant.

NOTICE OF MOTION
and

MOTION TO CHANGE PLACE OF TRIAL.

Filed May 1, 1903.

ALBERT B. MAHORY, Clerk,

By F. J. Dugan, Deputy.

LAYFAYETTE GILL,
Attorney for Defendant. [58]

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant,

Plaintiff Above Named, and His Attorney, John R.
Aitken:

You will please take notice that the defendant will on the 8th of May, 1903, at 10 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, in Department 4 of the Superior Court of the City and County of San Francisco, at the courtroom thereof, in the City of San Francisco, move the Court to make an order changing the place of trial of this action from the City and County of San Francisco to the County of Riverside, in the State of California.

Said motion will be made upon the grounds:

I.

That the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action, wholly situated within the county of Riverside, State of California.

II.

That the said defendant, the Perris Irrigation District, on the 1st day of January, 1891, was wholly within the county of San Diego, State of California, but thereafter pursuant to an Act of the Legislature

of the State of California, entitled an Act to create the County of Riverside, classify it, define its boundaries, provide for its organization, and the appointment, election of officers, the location of the county seat by election, and the adjustment and fulfillment of certain rights and obligations arising between said county and certain other counties, [59] approved March 11, 1893, was taken entirely from within the boundaries of San Diego County, and became, and ever since has been and now is, a part of the county of Riverside, in said State of California.

III.

That the contracts sued upon in this action were made within the boundaries of the said Perris Irrigation District formerly in the county of San Diego, but now in the county of Riverside, as aforesaid, and at no other place.

IV.

That the obligation or liability of the defendant, if any, upon said contracts sued upon in this action arose originally in the said county of San Diego, but such, if any, obligation or liability upon said contracts sued upon herein now exists or existed at the time of the commencement of this action, the same exists in the county of Riverside, in the State of California, by reason of the said defendant, the Perris Irrigation District, having been taken from the said county of San Diego and made a part of the county of Riverside, pursuant to the said Act of the Legislature of the State of California, creating the county of Riverside approved March 11th, 1893, hereinbefore referred to.

V.

That the principal office and place of business of defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action in the county of Riverside, State of California.

VI.

That any obligation or liability arising or existing upon the contracts sued upon in this action is to be performed at the office of the Treasurer of the said Perris Irrigation District, formerly in the county of San Diego, but now in the county of Riverside.

Said motion will be based upon the affidavits of W. H. [60] Pilch, president of the Board of Directors of said defendant, and George M. Pearson, County Surveyor of the said county of Riverside, copies of which affidavits are herewith served upon you; also based upon an Act of the Legislature of the State of California, entitled, "An Act creating the County of Riverside, etc.," approved March 11th, 1893; and also based upon the verified complaint of the plaintiff herein, to which Act of the Legislature reference is hereby made. The aforesaid affidavits, the said Act of the Legislature and the complaint of the plaintiff herein will be used upon the hearing of said motion, a copy of said motion is also herewith served upon you.

LAYFAYETTE GILL,
Attorney for Defendant. [61]

**[Motion of Defendant for Order Placing Change of
Trial in Cullen vs. Perris Irrigation District.]**

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

NOTICE TO CHANGE PLACE OF TRIAL.

Comes now the defendant above named and moves the Court to make an order changing the place of trial of this action from the City and County of San Francisco, to the county of Riverside, upon the following grounds:

I.

That the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action, wholly situated within the county of Riverside, State of California.

II.

That the said defendant, the Perris Irrigation District, on the 1st day of January, 1891, was wholly within the county of San Diego, State of California, but thereafter pursuant to an Act of the Legislature of the State of California, entitled, "An Act to create the county of Riverside, classify it, define its boundaries, provide for its organization, and the appointment, election of officers, the location of county

seat by election, and the adjustment and fulfillment of certain rights and obligations arising between said county and certain other counties," approved March 11th, 1893, was taken entirely from within the boundaries of San Diego County and became, and ever since has been and now is a part of the county of Riverside, in said State of California.

III.

That the contracts sued upon in this action were made [62] within the boundaries of the said Perris Irrigation District formerly in the county of San Diego, but now in the county of Riverside, as aforesaid, and at no other place.

IV.

That the obligation or liability of the defendant, if any, upon said contracts sued upon in this action arose originally in the said county of San Diego, but such, if any, obligation or liability upon said contracts sued upon herein now exists or existed at the time of the commencement of this action, the same exists in the county of Riverside, in the State of California, by reason of the said defendant, the Perris Irrigation District, having been taken from the said county of San Diego and made a part of the county of Riverside, pursuant to the said act of the Legislature of the State of California, creating the county of Riverside, approved March 11th, 1893, hereinbefore referred to.

V.

That the principal office and place of business of defendant, the Perris Irrigation District, now is and was at the time of the commencement of this action

in the county of Riverside, State of California.

VI.

That any obligation or liability existing or arising upon the contracts sued upon in this action is to be performed at the office of the Treasurer of said Perris Irrigation District formerly in the county of San Diego, but now in the county of Riverside.

This motion is based upon the affidavit of W. H. Pilch, President of the Board of Directors of the said defendant, the Perris Irrigation District, and upon the affidavit of George M. Pearson, County Surveyor of the said county of Riverside, which said affidavits are each attached hereto and made a part hereof, and will also be based upon an act of the Legislature entitled, "An Act Creating the County of Riverside, etc.," approved March 11th, 1893, to which reference is hereby made.

LAYFAYETTE GILL,
Attorney for Defendant. [63]

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,

Defendant.

Affidavit of W. H. Pilch [in Cullen vs. Perris Irrigation District].

State of California,
County of Riverside,—ss.

W. H. Pilch, being first duly sworn, deposes and says: That he is the president of the Board of Directors of the defendant herein, the Perris Irrigation District; that the said Perris Irrigation District now is and was at the time of the commencement of this action wholly situated within the county of Riverside, State of California; that although said defendant, the Perris Irrigation District, was at the time of the issuance of the bonds and coupons sued upon in this action wholly located within the county of San Diego, said district has by an act of the Legislature of the State of California entitled "An Act to create the county of Riverside, etc.," approved March 11th, 1893, been taken from the said county of San Diego and included within the said county of Riverside. That the contracts sued upon in this action were made within the said Perris Irrigation District formerly within the county of San Diego but now in the county of Riverside; that the obligation or liability arising upon said contracts or either of them, if any, existed at the time of the commencement of this action were and are to be performed within the said county of Riverside. That the principal and only place of business of the said defendant, the Perris Irrigation District, now is, and was at the time of the commencement of this action in the county of Riverside, in the State of California. [64]

Affiant further saith: That he has fully and fairly stated the facts of the case to Layfayette Gill, Esq., an attorney at law, and attorney for defendant herein, the Perris Irrigation District, and after so fully and fairly stating all the facts of the case to said attorney, he is advised by the said attorney that the defendant, herein, the Perris Irrigation District, has a good and valid defense to plaintiff's cause of action upon the merits thereof, and affiant verily believes from the advice given him by said attorney that the said defendant, the Perris Irrigation District, has a good and meritorious defense to plaintiff's cause of action upon the merits thereof.

W. H. PILCH.

Subscribed and sworn to before me this 27th day of April, 1903.

[Notarial Seal] LAYFAYETTE GILL,
Notary Public in and for Riverside County, State of
California. [65]

*In the Superior Court of the City and County of San
Francisco, State of California.*

J. C. CULLEN,

Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT,
Defendant.

**Affidavit of Geo. M. Pearson [in Cullen vs. Perris
Irrigation District].**

State of California,

County of Riverside,—ss.

George M. Pearson, being first duly sworn, deposes

and says: My name is George M. Pearson; I now am and ever since the creation of the county of Riverside, in the State of California, have been the County Surveyor of the said county of Riverside; that during all of said time I have been and now am a regularly licensed surveyor.

That I am well acquainted with the boundary lines of the said county of Riverside, and well acquainted with the boundaries of the said defendant, the Perris Irrigation District; that the said defendant, the Perris Irrigation District, now is and continuously has been ever since the creation of the county of Riverside, to wit, the 11th day of March, 1893, wholly within the boundaries of the county of Riverside.

GEO. M. PEARSON.

Subscribed and sworn to before me this 27th day of April, 1903.

[Notarial Seal] LAYFAYETTE GILL,
Notary Public in and for Riverside County, State of
California. [66]

State of California,—

County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true and correct copy of the Notice of Motion and Motion to Change Place of Trial in case of J. C. Cullen vs. The Perris Irrigation District on file in my office.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed by official seal this 27th day of June, A. D. 1912.

[Great Seal of State]

A. B. PILCH,
Clerk.

By Chas. O. Reid,
Deputy Clerk. [67]

**Exhibit "C" [to Affidavit of Oscar C. Mueller—
Affidavit of W. H. Pilch to Answer in Leeman
vs. Perris Irrigation District].**

State of California,
County of Riverside,—ss.

W. H. Pilch, being duly sworn, deposes and says that he is President of the Board of Directors of the defendant in the above-entitled action; that he has heard read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

W. H. PILCH.

Subscribed and sworn to before me this 9th day of August, 1902.

[Seal]

LAFAYETTE GILL,
Notary Public in and for Riverside County, State of California.

[Endorsement on Answer]: In the Superior Court of the County of Riverside, State of California. L. E. Leeman, Plaintiff, vs. Perris Irrigation District, Defendant. Filed Aug. 9, 1902. W. W.

Phelps, Clerk. By H. M. Helmer, Deputy. Service of the within Answer is hereby admitted this 9th day of August, 1902. Wilfred M. Peck, Attorney for Plaintiff, Lafayette Gill, Atty. for Deft.

State of California,
County of Riverside,—ss.

I, A. B. Pilch, County Clerk and ex-officio Clerk of the Superior Court of said County, hereby certify the foregoing to be a full, true and correct copy of the affidavit of W. H. Pilch to the Answer in the case of L. E. Leeman vs. Perris Irrigation District on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 28th day of June, A. D. 1912.

[Seal]

A. B. PILCH,
Clerk.

By Chas. O. Reid,
Deputy Clerk.

[Endorsed]: No. 1143. In the United States District Court, Ninth Circuit, Southern District of California, Southern Division. R. H. [68] Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Affidavit. Received copy of the within affidavit this 31st day of July, 1912. John D. Works, Lewis R. Works, Bradner W. Lee, Frank W. Stafford, Attys. for Defendant. Oscar C. Mueller, William M. Hiatt, Attorneys for Plaintiff. Filed Aug. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [69]

[Order Denying Motion to Quash Service of Summons and Motion to Dismiss Cause.]

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 17th of February, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Oscar C. Mueller, Esq., and Wm. M. Hiatt, Esq., appearing as counsel for plaintiff; Frank W. Stafford, Esq., appearing on behalf of Lewis R. Works, Esq., as counsel for defendant; this cause having heretofore been submitted to the Court for its consideration and decision on defendant's motion to quash the service of summons herein, and also on defendant's motion to dismiss this cause; the Court, having duly considered the same, and being fully advised in the premises, now reads its conclusions in this and cases C. C. No. 1226 and C. C. No. 1256, and it is ordered that defendant's motion to quash the service of summons herein, and defendant's motion

to dismiss this cause be, and said motions hereby are denied; and Frank W. Stafford, Esq., on behalf of defendant's counsel, having moved the Court for a stay of proceedings herein, it is ordered that said cause be, and the same hereby is continued until Tuesday, the 18th day of February, 1913, at 10:30 o'clock A. M. for hearing on said motion. [70]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

C. C. No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Also Other Plaintiffs Against the Same Defendant,
Being Cases C. C. Numbers 1226 and 1256.

**Conclusions of the Court on Defendant's Motions to
Quash and Dismiss.**

The issue raised at this hearing depends upon the law of California. (Revised Statutes of the United States, section 914.)

The Supreme Court of said State, construing sections 405 and 406 of the Code of Civil Procedure, has held, that a summons [71] is issued when the officer charged with its issuance has done all that the law requires him to do in reference thereto. (Cowell vs. Stewart et al., 69 Cal. 525.)

The doctrine of this case, so far from being contrary to is impliedly sanctioned in *Reynolds vs. Page*, 35 Cal. 296, 300, where the Court says:

“The issuing of the summons intended is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting a valid service. * * * And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal.”

The other California cases cited in defendant's brief do not relate to the point now under consideration; nor does Rule 7 of this Court in any way conflict with the decision in *Cowell vs. Stewart*, *supra*, and said decision, I hold, is the law applicable to the case at bar.

This conclusion renders it unnecessary for me to review the other authorities cited in the briefs of the respective parties.

Defendant's motions are denied.

OLIN WELLBORN,
Judge.

[Endorsed]: C. C. No. 1143. United States District Court, Southern District of California, Southern Division. *R. H. Thompson vs. Perris Irrigation District*. Also C. C. Nos. 1226 and 1256. Conclusions of the Court on Defendant's Motions to Quash and Dismiss. Filed February 17, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Notice of Motion [to Vacate Judgment].

To the Plaintiff and to Messrs. Oscar C. Mueller and
Wm. M. Hiatt, Attorneys for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that on Monday, March 31, 1913, at 10:30 o'clock A. M., or as soon thereafter as counsel may be heard, the defendant in the above-entitled action will move the Court, in the courtroom thereof, at Los Angeles, California, for an order setting aside the judgment in said action, which said judgment was entered therein on February 18, 1913, on the ground that the summons in said action was not issued within one year after the filing of the complaint therein, as required by sections 406 and 581a of the Code of Civil Procedure of the State of California and Rule 7 of the rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

The said motion will be made upon the judgment-roll in said action.

JOHN D. WORKS,
LEWIS R. WORKS,
BRADNER W. LEE,
FRANK W. STAFFORD,
C. HUGHES JORDAN,
Attorneys for Defendant. [73]

[Endorsed]: No. 1143. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Notice of Motion. Received Copy of the Within March 26, 1913. Oscar C. Mueller, Wm. M. Hiatt, A. M. McGrew. Filed Mar. 31, 1913. Wm. M. Van Dyke. Clerk. By Chas. N. Williams, Deputy Clerk. Bradner W. Lee, John D. Works, Lewis R. Works, Attorneys at Law, Suite 821, H. W. Hellman Bldg., Los Angeles, Cal. Frank W. Stafford, C. Hughes Jordan, Solicitors for Defendant. [74]

[Order Denying Motion to Dismiss Judgment.]

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the thirty-first of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1143.

R. H. THOMPSON,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Wm. M. Hiatt, Esq., appearing as counsel for plaintiff; Lewis R. Works, Esq., appearing as counsel for defendant; now comes said Lewis R. Works, Esq., of counsel for defendant, and moves the Court to dismiss the judgment heretofore entered in this cause; and said motion having been presented and submitted to the Court for its consideration and decision; it is now by the court ordered that said motion to dismiss the judgment herein be, and the same hereby is denied. [75]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,

Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,

Defendant.

Assignment of Errors.

Now comes the defendant, Perris Irrigation District, plaintiff in error in the above-entitled cause,

and in connection with its petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred in the proceedings thereof, and upon which it relies to set aside and vacate the judgment of the Court and reverse the order and judgment of the Court in overruling the motion of plaintiff in error to set aside and vacate the said judgment entered herein, as appears of record.

I.

That the Court erred in entering judgment in said action, because that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [76]

II.

That the Court erred in entering judgment in said action, because that the complaint therein was filed on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

III.

That the Court erred in entering judgment in said action, because that the said action was commenced on the 29th day of December, 1904, and that the sum-

mons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

IV.

That the Court erred in entering judgment in said action, because that said action was commenced by the filing of a complaint on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

V.

That the Court erred in entering judgment in said action, because that the same was commenced by the filing of a complaint [77] on the 29th day of December, 1904, and the summons therein was not delivered to the United States Marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

VI.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment

entered in said action, because that the said motion should have been granted for the reason that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

VII.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the complaint therein was filed on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California. [78]

VIII.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of

Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

IX.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced by the filing of a complaint on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

X.

That the Court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the same was commenced by the filing of a complaint on the 29th day of December, 1904, and the summons therein was not delivered to the United States Marshal for service until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure [79] of the State of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

WHEREFORE, plaintiff in error prays that the judgment of the Court and the order overruling the

motion to vacate and set aside the judgment of said Court be reversed, and that the mandate of the Court may issue directing that said motion be sustained, and that the judgment entered in said action be vacated and for naught held and taken.

LEWIS R. WORKS,
C. HUGHES JORDAN,
FRANK W. STAFFORD,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1143. Law. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased, Plaintiff, vs. Perris Irrigation District, Defendant. Assignment of Errors. Filed Aug. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [80]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Petition for Writ of Error.

To the Honorable OLIN WELLBORN, Judge of the
District Court Aforesaid:

Now comes the Perris Irrigation District, a corporation, by its attorneys, and respectfully shows that on the 18th day of February, 1913, the Court granted a default and a final judgment against the defendant in the above-entitled action; that the said defendant thereafter entered its special appearance for the purposes of its motion only, and filed its said motion in said court, praying the Court to vacate and set aside the judgment in said action on the ground that the summons was not issued within one year after the filing of the complaint in said action, which said motion was denied by the said court on March 31st, 1913.

Your petitioner feeling itself aggrieved by the said order and judgment entered therein, as aforesaid, hereby petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided. [81]

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said circuit, for the correction of the errors complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of se-

curity to be given by plaintiff in error, conditioned as the law directs.

LEWIS R. WORKS,
C. HUGHES JORDAN,
FRANK W. STAFFORD,

Attorneys for Petitioner in Error.

[Endorsed]: No. 1143. Law. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased, Plaintiff, vs. Perris Irrigation District, Defendant. Petition for Writ of Error. Filed Aug. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at Law, Suite 821 H. W. Hellman Bldg., Los Angeles, Cal., Attorneys for Defendant. [82]

*In the United States District Court, Ninth Circuit,
in and for the Southern District of California,
Southern Division.*

AT LAW—No. 1143.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Order Granting Writ of Error [and Fixing Amount of Bond].

BE IT REMEMBERED, that in the above-entitled action, the said Perris Irrigation District, defendant, presented and caused to be filed, its petition praying that a writ of error do issue, and that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, be allowed, and at the same time presented and caused to be filed its assignment of error, all as required by the statutes and rules of said court.

The Court does this 16th day of August, 1913, grant said writ of error upon the giving of a bond in the sum of Three Hundred Dollars (\$300.00), conditioned to answer all costs in said action, and on said appeal, if the plaintiff in error fails to make his plea good.

OLIN WELLBORN,
Judge of the United States District Court, Southern
District of California.

[Endorsed]: No. 1143. Law. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased, Plaintiff, vs. Perris Irrigation District, Defendant. Order Granting Writ of Error. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Lewis R. Works, C. Hughes Jordan, Frank W. Stafford, Attorneys at

Law, Suite 821 H. W. Hellman Bldg., Los Angeles,
Cal., Attorneys for Defendant. [83]

*In the District Court of the United States, Ninth Cir-
cuit, Southern District of California, Southern
Division.*

AT LAW—No. 1143.

R. N. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Plaintiff,

vs.

PERRIS IRRIGATION DISTRICT,
Defendant.

Undertaking on Appeal, Costs Only.

WHEREAS, the defendant in the above-entitled action is about to appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment entered against said defendant in said action, in said District Court of the United States, in favor of the plaintiff in said action, on the eighteenth day of February, 1912, for Twenty-seven Thousand and Eight and 28/100 Dollars, and Dollars, cost of suit.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned, Pacific Coast Casualty Company, a corporation organized and existing under the laws of the State of California, and duly authorized to transact a general surety business, does hereby undertake and promise on the part of the appellant that said appellant will pay all costs which may be awarded against it on the appeal,

or on a dismissal thereof, not exceeding THREE HUNDRED DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said surety has caused its corporate name and seal to be affixed by its duly authorized officer at Los Angeles, California, the fifth day of June, 1913.

PACIFIC COAST CASUALTY COMPANY,

[Seal] By HARRY D. VANDEVEER,

Its Attorney in Fact. [84]

State of California,

County of Los Angeles,—ss.

On this 5th day of June, in the year one thousand nine hundred and thirteen, before me, Leona Blum, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Harry D. Vandever, known to me to be the duly authorized attorney in fact, of the Pacific Coast Casualty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact, of said company, and the said Harry D. Vandever, duly acknowledged to me that he subscribed the name of the Pacific Coast Casualty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

LEONA BLUM,

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. 1143. In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division. R. H. Thompson, Plaintiff, vs. Perris Irrigation District, Defendant. Undertaking on Appeal. Costs only. Approved August 16th, 1913. Olin Wellborn, Judge. Filed Aug. 16, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [85]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

No. 1143.

Clerk's Office.

R. B. TURNBULL, Administrator, etc.,
vs.

PERRIS IRRIGATION DISTRICT.

Amended Praeipe [for Transcript of Record].

To the Clerk of said Court:

Sir: Please issue transcript on appeal now pending, containing:

The judgment-roll;

Default and all orders, praecipis, etc., relating thereto;

Motion to vacate and set aside service of summons, together with orders, notices, praecipis, etc., pertaining thereto;

Order denying above motion;

Motion to vacate judgment and set aside default,

together with orders, notices, praecipes, etc., pertaining thereto;

Order denying above motion;

Petition for Writ of Error;

Assignment of Errors;

Order granting Writ of Error;

Writ of Error;

Citation.

FRANK W. STAFFORD,

C. HUGHES JORDAN,

Attorneys for Defendant.

[Endorsed]: C. C. No. 1143. U. S. District Court, Southern District of California, Southern Division. R. B. Turnbull, Admr., etc., vs. Perris Irrigation District Amended Praecipe for Transcript. Filed Oct. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [86]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States in and for the Southern District of California, Southern Division.

C. C. No. 1143.

R. B. TURNBULL, Administrator of the Estate
of R. H. THOMPSON, Deceased,
Plaintiff,

vs.

THE PERRIS IRRIGATION DISTRICT (a Corporation),

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify that the foregoing eighty-six (86) typewritten pages, numbered from 1 to 87, inclusive, and comprised in one volume, are a full, true and correct copy of the pleadings, and of all papers and proceedings upon which the judgment in favor of the plaintiff was made and entered in said cause, and also of the Conclusions of the Court, Assignment of Errors, Petition for Writ of Error, Order Granting Writ of Error, Bond on Writ of Error and Amended Praecipe for Transcript in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

I do further certify that the cost of the foregoing record is \$41.40, the amount whereof has been paid to me by the Perris Irrigation District, a corporation, the [87] plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America in and for the Southern District of California, Southern Division, this 9th day of December, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[88]

[Endorsed]: No. 2356. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, a Corporation, Plaintiff in Error, vs. R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed December 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to November 1, 1913, to
Docket Case, etc., in Appellate Court.]

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

PERRIS IRRIGATION DISTRICT,
Plaintiff in Error,
vs.

R. B. TURNBULL, Administrator of the Estate of
R. H. THOMPSON, Deceased,
Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the

same is hereby enlarged and extended to and including the 1st day of November, 1913.

Dated at Los Angeles, September 5th, 1913.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: No. ———. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, Plaintiff in Error, vs. R. B. Turnbull, Administrator, etc., Defendant in Error. Order Extending Time to File Record. Filed Sep. 6, 1913. F. D. Monckton, Clerk.

[Order Enlarging Time to January 1, 1914, to Docket Case, etc., in Appellate Court.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

PERRIS IRRIGATION DISTRICT,

Plaintiff in Error,

vs.

R. B. TURNBULL, Administrator of the Estate of

R. H. THOMPSON, Deceased,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and includ-

ing the 1st day of January, 1914.

Dated at Los Angeles, October 18th, 1913.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. ———. United States Circuit Court of Appeals for the Ninth Circuit. Perris Irrigation District, Plaintiff in Error, vs. R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased, Defendant in Error. Order Enlarging Time to Docket Cause and File Record. Filed Oct. 20, 1913. F. D. Monekton, Clerk.

No. 2356. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to January 1, 1914, to File Record Thereof and to Docket Case. Re-filed Dec. 26, 1913. F. D. Monekton, Clerk.

No. 2356.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Perris Irrigation District,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
R. B. Turnbull, Administrator of the Estate of R. H. Thompson. deceased,	
<i>Defendant in Error.</i>	}

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was commenced by R. H. Thompson, deceased, by filing a complaint in the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, on December 29th, 1904 [Transcript, p. 18]. Summons was signed, sealed and bears teste of the date of December 16th, 1905.

In the early part of 1907 Oscar C. Mueller went to Riverside county and to the Perris Irrigation District and inquired of various persons as to who the officers of the district were, but could obtain no information [Transcript, p. 47]. Prior to this time he confined

his inquiries to persons he happened to meet. Reference to the various documents will show that Mr. Mueller has throughout the period engaged in the practice of law in the city of Los Angeles, and the defendant was a municipal corporation in Riverside county. That thereafter Mr. Mueller employed Pinkerton detectives who informed him that W. H. Pilch, Duncan McPherson and A. R. Fredericks were reputed to be the officers of the district [Transcript, p. 47].

William M. Hiatt, co-counsel of Mr. Mueller, who is and was practicing law in the city of Los Angeles, inquired of many people as to who were the officers of the defendant district. He went to Riverside county about May 1st, 1907, and inquired of a Mr. Hook and a Mr. Gates as to the names of the officers of the defendant district, and the whereabouts of its books and records. For the first time he then caused a search of the records of the recorder's office of the county of Riverside to be made and was informed that the directors, as shown by the recorder's office, were W. H. Pilch, Duncan McPherson and A. R. Frederick [Transcript, pp. 49 and 50]. W. H. Pilch, Duncan McPherson and A. R. Fredericks were appointed directors July 7th, 1902 [Transcript, p. 39]. Service was had upon them July 7th and 20th, 1907. The original return of the marshal shows the summons was received by him July 2d, 1907 [Transcript, p. 20].

It appears from the facts shown that there was no diligence shown to even find out the names of the persons to be served until almost two and one-half years after the filing of the complaint, and over one year

after the date of the sealing of the instrument by the clerk. It is not shown where the summons was during this period. All that the records disclose is that it bears teste of December 16th, 1905, but that it was not delivered to the marshal until January 3d, 1907.

The questions of law in this case (see specifications of error below) were raised by special appearance in the form of a motion to dismiss [Transcript, pp. 55 and 56], and again by a motion to vacate judgment [Transcript, pp. 83, 84]; there having been no general appearance on the part of the defendant district.

SPECIFICATION OF ERROR.

The assignment of errors [Transcript, p. 75 *et seq.*] sets out ten alleged errors which will, for convenience, be grouped together with the original number to the left of the first line indicating the number of the assignment in the transcript of record.

1. That the court erred in entering judgment in said action because that the summons therein was not issued within, but was issued after the expiration of, one year after the filing of the complaint in said action, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

5. That the court erred in entering judgment in said action because that the same was commenced by the filing of a complaint on the 29th day of December, 1904, and the summons therein was not delivered to the United States marshal for service until the 3d day

of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

8. That the court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

9. That the court erred in overruling the motion of plaintiff in error to vacate and set aside the judgment entered in said action, because that the said motion should have been granted for the reason that the said action was commenced by the filing of a complaint on the 29th day of December, 1904, and that the summons therein was not issued until the 3d day of January, 1907, contrary to the requirements of sections 406 and 581a of the Code of Civil Procedure of the state of California, and of Rule 7 of the Rules of the United States Circuit Court for the Ninth Circuit, Southern District of California.

ARGUMENT.

Summons was never legally issued for the reason that it was not issued within one year from the filing of the complaint.

Civil actions are commenced by the filing of a complaint.

C. C. P., Sec. 405;

Rule 6, Ninth Circuit.

The summons may be issued at any time "within one year" after the filing of the complaint.

C. C. P., Sec. 406;

Rule 7, Ninth Circuit.

Summons must be served by the marshal or his deputy.

Rule 8, Ninth Circuit.

From the record it appears that in this case the summons was not delivered to a person, or officer having power to serve it (that is to say, to the marshal or his deputy), within one year from the commencement of the action, by the filing of the complaint.

A SUMMONS IS NOT "ISSUED" UNTIL IT IS DELIVERED TO SOME PERSON OR OFFICER HAVING POWER TO SERVE IT.

This rule is supported by abundant authority.

The case of *Hekla Insurance Company v. Schroeder* (9 Ill. App. 472, 475) is a case wherein it was necessary to determine what constitutes "issuance" of summons. There the court, after discussing numerous au-

thorities, announces the rule "that the mere making out, signing and sealing of the summons by the clerk, or even its delivery by him to the plaintiff, or his attorney, is not the commencement of the suit, but that, before the writ can, in a legal sense, be regarded as issued, or the suit commenced, the writ must be either actually or constructively delivered to the sheriff for service."

That decision (*Hekla etc. v. Schroeder*) was apparently based in part on the proposition that, inasmuch as the sheriff is the only person empowered to serve summons, the summons is not issued until delivered to him, who can serve it.

In the case of *White v. Johnson*, 27 Oregon 282, 40 Pac. 511, the question of what constitutes issuance of a summons was raised. The court there said:

"A summons may be said to have issued in an action commenced in the circuit or county courts of this state when it is made out and signed by the plaintiff or his attorney, and placed in the hands of the sheriff, with the intention that it be served upon the defendant. It is difficult to see how anything less than this would constitute an issuance of a summons. The statute requires that the summons shall be served by the sheriff, and, without a delivery to him for service, such instrument is not yet endowed with vitality for any purpose. *Insurance Co. v. Schroeder*, 9 Ill. App. 472; *Ross v. Luther*, 4 Cow. 158; and *Mills v. Corbett*, *supra*."

In *Mills v. Corbett*, 8 How. (N. Y.) 500, 502, the court said:

"I think any process may be said to be issued, where it is made out and placed in the hands of a

person authorized to serve it, and with a *bona fide* intent to have it served, if practicable.”

Pease v. Ritchie, 24 N. E. 433, 434, is also authority (by analogy) supporting the contention of plaintiff in error. In that case (speaking of the writ of execution) the court said:

“The question to be considered is whether, within the meaning of the statute, an execution issued on the judgment in favor of Wells, Norton & Walker within one year from the time it was rendered. As before observed, the clerk made out an execution within the year, but it was never delivered to the sheriff to execute, and when found an indorsement was found on the back of the execution, ‘Not called for.’ We do not think what was done here can be regarded as a compliance with the statute. The statute requires something more than the mere writing of an execution by the clerk, and placing it among the files in his office. The word ‘issued,’ as used in the statute, has a more comprehensive meaning, and we think that the fair construction of the word as used in the statute requires an execution to be made out, properly attested by the clerk, and delivered to the sheriff to be executed by him. The object of issuing an execution is to collect the judgment; but that object cannot be carried out unless the execution is placed in the hands of an officer for collection. The only conclusion we are able to reach, when the purpose of the statute is kept in view, is that an execution cannot be said to be issued within the meaning of the statute until it is delivered to the sheriff to execute.”

The object of issuing a summons, is that it shall be served, and it is difficult to conceive how that object can be carried out if the writ remains in the hands of a person not qualified or empowered to serve it. As

the learned court in the case just cited was unable to reach any conclusion but that a writ of execution must be delivered to the sheriff "to execute" in order that it might be said to have been issued, so we are unable to reach any conclusion but that a summons must be delivered to the marshal to be served before it can be said to have been issued.

The case of *Reynolds v. Page* is a California case dealing with a question somewhat similar to the one here involved. In that case a complaint had been filed and a summons duly signed and sealed delivered by the clerk to plaintiffs' attorney; but the summons was not placed in the hands of an officer or other person for service, and no certified copy of the complaint was prepared and delivered to the plaintiff, or his attorney, for nearly four years. The court in sustaining an order dismissing the action, said: "The summons cannot be said to be issued within the meaning of the act, till it is in a condition to serve," and held, that inasmuch as the summons was not delivered in a condition to be served, it was not issued within the meaning of the law.

"And we think the summons not issued within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal."

Reynolds v. Page, 35 Cal. 296, 299, 300.

It seems clear that if a failure in one particular to place the summons in a condition to be served will render it void, and furnish ground for dismissal of the

action, then failure in another particular to place it in condition to be served will also render it void (i. e., not issued). There can be no other reasonable conclusion.

What distinction can there be between its not being in a condition to be served, and its not being in the hands of a person empowered to serve it? In neither case can it be served.

See also:

Ross v. Luther, 4 Cowen (N. Y.) 158.

It will be observed by the court that in each of the cases above cited (except Pease v. Ritchie), the question directly involved is, What constitutes issuance of summons? In each of the cases this point was decided as necessary to the decision of other points; but nevertheless it was directly involved, and we are unable to find any point in any of these cases which would distinguish it from the case at bar.

The rule here contended for is also based on sound legal reasoning in this, that it recognizes the proposition that an action may be commenced, and the statute of limitations forestalled, while there is no *bona fide* intent, or attempt, to obtain service or in any other manner proceed with the litigation. Moreover, it is the policy of the courts that all matters before them should be expedited in order that their records may not be encumbered with dormant and stale matters.

There is another element of "issuance" to which we desire to call the attention of the court:

Summons must be delivered to some person empowered to serve it, *with a bona fide intent that it be served, if practicable.*

Mills v. Corbett, 6 How. (N. Y.) 500, 502;

Ross v. Luther, 4 Cowen (N. Y.) 158.

That in the case at bar there was no *bona fide* intent to serve summons is disclosed by the fact that, although there were on file (as required by sections 12 and 19 of an act "To provide for the organization and government of irrigation districts," etc. [Henning's General Laws of California, 1905, pp. 559, 562 and 565]) the bonds of the various officers of the Perris Irrigation District (containing the names of those officers), no effort was made to ascertain who they were until shortly before the summons was actually delivered to the marshal.

[See affidavit of Oscar Mueller, Transcript pp. 46, 47, 51, 52 and 53.]

[Affidavit of Wm. M. Hiatt, Transcript pp. 48, 49 and 50.]

Section 12 of the above cited act is as follows:

"The officers elected at the election hereinbefore provided for shall immediately enter upon their duties as such, upon qualifying in the manner for such officers herein provided. Said officers shall hold office respectively until their successors are elected and qualified."

Section 19, in part, is as follows:

"Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved

by the judge of the superior court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of said board."

A defendant may have an action dismissed for want of prosecution, or it is the duty of the court to dismiss, of its own motion, where the record shows that summons has not been issued "within one year after the filing" of the complaint.

C. C. P., Sec. 581a;

Rule 7, Ninth Circuit;

Reynolds v. Page, 35 Cal. 296, 300;

People v. Davis, 143 Cal. 673, 675;

Wiencke v. Bibby, 15 Cal. App. 50, 53;

People v. Mulcahy, 159 Cal. 34, 35.

The case of *Cowell v. Stewart* (69 Cal. 525), on the authority of which the learned judge of the District Court decided this case, is readily distinguishable from the case at bar. In the *Cowell* case the proposition that the sheriff was the only person empowered to serve summons was not considered, and did not affect the decision. The question raised was that summons was not served within one year from the filing of the complaint. In fact the summons was during all of the time in the hands of a person empowered to serve summons; it was in the hands of the attorney for the plaintiff, a person over the age of twenty-one years. Also, the delay was caused by the request of the defendant that the action be delayed, thus raising the point that the defendant should not profit by his own wrong.

In the United States Court (as has been heretofore set forth) the summons can only be served by the marshal or by one of his deputies.

Hence it follows that inasmuch as the law requires that a summons to be issued must be delivered to an officer authorized and empowered to serve it, with the *bona fide* intent that it be served; inasmuch as summons in this case was not issued, as required by law, within one year from the filing of the complaint; and inasmuch as the law provides that an action must be dismissed where summons has not been issued, as required by law, within one year after the filing of the complaint; that the District Court erred in the particulars above set forth in the specifications of error.

Respectfully submitted,

C. HUGHES JORDAN,

FRANK W. STAFFORD,

KENYON F. LEE,

Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Perris Irrigation District, <i>Plaintiff in Error,</i> <i>vs.</i> R. B. Turnbull, Administrator of the Estate of R. H. Thompson, deceased, <i>Defendant in Error.</i>	}
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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

We controvert the statement of the case as presented by the plaintiff in error, as follows:

The complaint was filed December 29th, 1904.

We contend that the summons was issued December 16, 1905.

The proceedings thereafter consisted of the following:

Summons received by the marshal January 3, 1907.

Summons served July 9, 1907.

Default of defendant for not answering entered September 12, 1907.

(Judgment did not immediately follow on account of a bill in equity filed by property owners in the district seeking to restrain the prosecution of the action. See *Quinton v. Equitable Investment Company*, Case #2093 of the files of this court. 196 Fed. 314.)

Notice of motion to set aside service of summons filed June 6, 1912.

Notice of motion to dismiss action filed June 19, 1912.

Judgment for \$27,008.28 entered February 18, 1913.

IT WILL BE SEEN FROM THE FOREGOING THAT NEARLY FIVE YEARS ELAPSED AFTER THE ENTRY OF THE DEFAULT OF THE DISTRICT FOR NOT ANSWERING, AND THEN IT APPEARED SPECIALLY TO SET ASIDE THE SERVICE OF THE SUMMONS UPON THE GROUND THAT THE SUMMONS WAS NOT DELIVERED TO THE MARSHAL WITHIN ONE YEAR FROM THE DATE OF THE FILING OF THE COMPLAINT, ALTHOUGH ADMITTING THE SIGNING, SEALING AND ATTESTING THE SUMMONS WITHIN ONE YEAR FROM THE DATE OF THE FILING OF THE COMPLAINT.

As far as the efforts of Oscar C. Mueller and William M. Hiatt are concerned in locating the officers of the district, we call the court's attention to their affidavits found in folios 45-51, showing in detail their endeavors to find the officers upon whom service could be made. The officers of the district had apparently abandoned their positions and it required the services of private detectives to ascertain the whereabouts of the last known directors. When these were found service was made by the marshal. Commenting upon

the time elapsing from what we claim to be the issuing of the summons and the actual service, counsel say:

"It is not shown where the summons was during this period."

We contend that it makes no difference where the summons is after the clerk has performed all of his duties and it is in a *condition to be served*. We will show that it was issued within the year after the filing of the complaint and served within the three years allowed by the statutes. The burden is on the plaintiff in error to show that the summons did not leave the clerk's office until more than one year after filing the complaint. This it utterly fails to do.

ARGUMENT.

PLAINTIFF IN ERROR'S APPEAL RESTS SOLELY UPON THE CLAIM THAT THE JUDGMENT IS VOID ON ITS FACE. OTHERWISE IT MUST BE ADMITTED THAT PLAINTIFF IN ERROR WAS GUILTY OF LACHES IN PERMITTING FOUR YEARS AND NINE MONTHS TO INTERVENE BETWEEN THE DATE OF THE ENTRY OF THE DEFAULT OF THE DISTRICT AND THE DATE OF THE MOTION TO SET ASIDE THE DEFAULT.

The contention of the plaintiff in error is founded upon a theory that the judgment is void upon the face of the record. In other words, that the judgment roll shows upon its face such a lack of jurisdiction of the person of the defendant that the judgment is an absolute nullity. Plaintiff in error has no standing in court to be heard upon any question upon the merits of the

case or go into the procedure in the case on account of the fact that so many years intervened between the entry of the default of the plaintiff in error and the making of the motion to set aside the default. In support of this contention it will suffice to call the court's attention to *People v. Davis*, 143 Cal. 676, where the court said:

"It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face unless the motion is made within a reasonable time, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which *in no case exceeds one year*. It is also well settled law that a judgment is not void upon its face unless its invalidity is apparent from an inspection of the judgment roll. It is hardly necessary to cite authorities to sustain these propositions."

We also refer the court to the case of *People v. Mulchy*, 159 Cal. 35, where the court approves the foregoing rule, and says:

"There can be no doubt of the correctness of the rule announced in the above cited case, and it therefore becomes our duty to scan the judgment roll and see whether or not invalidity of the judgment is apparent from an inspection thereof."

Again the Perris Irrigation District (plaintiff in error) was "out of court," on account of its failure to appear in the action. The effect of a default is shown in the recent case of *Title Ins. & Trust Co. v. King etc. Co.*, 162 Cal. 44. The court said:

"A default is entered by the clerk or by the court at the instance of the adverse party. It is a proceeding against the delinquent party. A de-

fault cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered is *out of court* and not entitled to take any further steps in the cause affecting plaintiff's right of action."

Can it be said that a defendant who has permitted so many years to elapse after a default is entered against it, could nevertheless come into court by a special appearance and procure a dismissal of the action on the ground that the clerk did not *give* the summons to the marshal within one year after the date of filing the complaint, and at the same time admit that the clerk performed all of the duties imposed upon him by law?

And this in the absence of any showing that the district had no actual notice of the bringing of the action and the default. For anything that appears in the record the plaintiff in error may have had actual knowledge of the bringing of the action from the date of the filing of the complaint.

WHAT CONSTITUTES THE JUDGMENT ROLL.

Section 670 of the Code of Civil Procedure of California provides that in cases like these the judgment roll shall consist of (1) the summons with the affidavit, or proof of service; (2) the complaint with a memorandum endorsed thereon that the default of the defendant in not answering was entered; (3) a copy of the judgment.

Rule 16 of the Rules of Practice of the United States Circuit Court for the Ninth Circuit, Southern District

of California, provides that in cases like these the judgment roll shall consist of (1) the summons with the proof of service; (2) the complaint and a copy of the entry of the default of the defendant; (3) a copy of the judgment.

It will be seen that by this rule the judgment roll in this case is practically the same as that provided by the state practice.

The facts then, so far as material to this appeal, are shown in the foregoing statement of facts.

The plaintiff in error's contention is that because the return of service of summons by the marshal shows that the marshal received the summons more than a year after the complaint was filed that no summons was *issued* within a year, and that for this reason the judgment entered is a nullity—that is, absolutely void and not merely voidable.

SUFFICIENT UNDER LAWS OF CALIFORNIA.

There can be no question but that the issuance and service of the summons conformed to the California practice as established by the Code of Civil Procedure.

Section 405 of the Code of Civil Procedure provides that actions are commenced by filing the complaint.

Section 406 of the Code of Civil Procedure provides that a summons may be issued by the clerk at any time within one year thereafter.

Section 407 of the Code of Civil Procedure:

“SUMMONS, HOW ISSUED, DIRECTED, AND WHAT TO CONTAIN. The summons must be directed to

the defendant, signed by the clerk, and *issued under the seal of the court*, and must contain:

1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed, etc.”

Section 581a of the Code of Civil Procedure provides that actions shall be dismissed unless summons shall have issued within one year and shall have been served and return made within three years after the commencement of the action.

Under the laws of California a summons is issued when the clerk has performed all of the acts which the law requires that he should perform, namely, when he, the clerk, has signed the summons and attached the seal of the court thereto.

COWELL v. STUART, 69 CAL. 525, COMPLETELY ANSWERS THE QUESTION RAISED BY PLAINTIFF IN ERROR.

In the case of Cowell v. Stuart, 69 Cal. 525, the question of issuance was directly decided by the court. The court spoke of the 6th day of November, 1882, as being the day that a summons was duly signed and sealed, and afterwards referred to this date by saying: “Within a year thereafter (the date of filing of the complaint) the summons was issued by the officer charged by law with the duty of issuing it, namely, the clerk.”

An examination of the transcript shows that summons was dated November 6, 1882, and that it was received by sheriffs as follows:

By the sheriff who served Stuart and Elder, December 20, 1882.

By the sheriff who served defendant Scheller, February 26, 1883;

And by the sheriff who served defendant Steele, January 19, 1883.

If a summons is only issued when delivered to the officer then in this case it was issued three times!

The facts are as follows:

The action was brought on promissory notes against five defendants. The complaint was filed November 9, 1881. On November 6, 1882, a summons was duly issued by the clerk. But, as stated by the court, "*Neither the summons nor a copy of the complaint was served or placed in the hands of the sheriff for service until after the expiration of one year from the time the complaint was filed, nor was there any appearance within the year by either of the defendants.*"

On this account the issuance of the summons was attacked by the defendants. However, citing sections 405-6 of the Code of Civil Procedure, the court said:

"When the clerk in the present case delivered to the plaintiff's attorney a summons duly signed and sealed, he had performed every act it was essential for him to perform in the matter. The action was commenced by the filing of the complaint and within a year thereafter the summons was issued by the officer charged by the law with the duty of issuing it, namely, the clerk. * * * When the officer who is charged with the duty of issuing *the summons has done all that the law requires him to do, we can see no ground for holding that the summons is not issued.*"

We contend that, as Judge Wellborn says, "The issue raised at this hearing depends upon the law of California, Rev. St. U. S., Sec. 914," the defendant in error had a right to rely upon this decision of the Supreme Court of California, construing the laws of California relating to the issuance of summons and it would be contrary to all sense of justice if the Perris Irrigation District could permit a default to be taken against it and then nearly five years thereafter move to set it aside upon the ground that the summons was not given to the marshal until after one year from the date of the filing of the complaint, and at the same time conceding that the clerk performed his duty in *making out and attesting the summons within year*. In the examination of the records in this case, let us see what the clerk of the court did. He took the complaint in this action and filed it on the 29th day of December, 1904; thereafter, to-wit, on the 16th day of December, 1905, he prepared a summons, placed the seal of the court thereon, signed his name [see transcript, folio 20]. Now this is all he was required to do. The statute of California says:

"The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court and must contain * * *." (Sec. 407, C. C. P.)

There is not one word in this statute or any United States statute, that the clerk must deliver it to the marshal. The *only* requirement, after the summons has been prepared by the clerk, is that it must be served within three years from the date of the filing of the complaint. The records of the clerk's office show the

date of the issuance of the summons. Inasmuch as the law gives three years to serve the summons, what possible difference can it make to a defendant where the summons is lodged from the time that it is attested by the clerk and the time it is actually served?

Shall a judgment for \$27,008.28 fall because the clerk of the court did not perform some act *not required of him*? And at the instance of a defendant who made no objection until nearly five years had elapsed after the entry of its default.

The plaintiff in error is in a very awkward position to complain of laches. It does not explain or attempt to explain its laches of nearly five years in allowing a default to remain undisturbed, and makes no showing that it did not know of the entry of the default.

On page 11 of the brief of the plaintiff in error, we find the following:

“Moreover, it is the policy of the courts, that all matters before them should be expedited in order that their records may not be encumbered with dormant and stale matters.”

And yet the records in this case show that plaintiff in error was served with summons on the 9th day of July, 1907, and its default was entered on the 12th day of September, 1907, and this default remained *unquestioned* by the Perris Irrigation District for *nearly five years*. Why didn't the Perris Irrigation District help the courts by bringing an early hearing on its motion to set aside the summons, if it is “the policy of the courts that all matters before them should be expedited”? After defaults are entered and allowed to

remain undisturbed for so many years, are they then "dormant and stale matters," or when do they become such?

RULE 7 OF THE UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF CALIFORNIA.

"RULE 7. DISMISSAL OF ACTIONS—FAILURE TO PROSECUTE—Whenever a complainant shall fail to have process issued upon any complaint hereafter filed in this court, within one year after the filing thereof against any defendant named therein, who has not voluntarily made a general appearance in the action, or who shall fail to make a *bona fide* effort to procure service of summons upon such defendant within sixty days after the issuing thereof, such defendant may, upon due notice to the complainant, have said complaint dismissed for want of prosecution; but this rule shall not affect the right of the court to dismiss actions for want of prosecution in other proper cases."

But here the Perris Irrigation District was "out of court" and could give no notice.

So far as we know no statute has been enacted by the congress of the United States requiring a summons in actions like these, to be issued within one year, or requiring its service within any given time. Plaintiff in error must, therefore, rely upon the above rule of court, and upon the requirement that all service of process in United States courts shall be by the marshal.

We contend that a judgment, to be absolutely void upon the face of the record, that is upon the judgment roll, must show a failure to comply with some *positive enactment of the legislative body, or some fundamental law*, otherwise, if the judgment were sued

upon in another court or in another state, the question of its validity or invalidity would depend upon proof of the rules of this court. In other words, the defect would not appear upon the face of the record without the proof of other matters.

Again, we contend that Rule 7 necessarily contemplates an application to the court to dismiss the action upon notice for want of prosecution. This being so it is an application to the jurisdiction of the court. This rule does not go to the extent of section 581a of the Code of Civil Procedure of California, which provides that if summons is not served and return made within three years, no further proceeding shall be had, and which has been held to deprive the courts of California of jurisdiction to proceed in such cases. But it is necessarily an application to exercise its jurisdiction, and if so the decision of the court made in the exercise of its jurisdiction is subject to be reviewed upon appeal, and does not make a judgment void upon the face of the record.

Section 914 of the Revised Statutes provides:

"The practice, pleadings and forms and modes of proceedings in civil cases other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the courts of record of the state within which such circuit or district courts are held, *any rule of court to the contrary notwithstanding.*"

First: Does Rule 7 of the Circuit Court of the Ninth Circuit, Southern District of California, require

the dismissal of these actions, and does said Rule 7 apply to the service of summons to the exclusion of sections 406, 581 and 581a of the Code of Civil Procedure of the state of California?

At the time this action was brought the Code of Civil Procedure of California provided that an action was commenced by the filing of the complaint, that a summons must issue within a year thereafter and that it must be served, returned and filed within three years from the time the complaint was filed. In this case the defendant in error is strictly within the rules prescribed by the Code of Civil Procedure of California.

We believe that we are strictly within said Rule 7 of the Circuit Court in the issuing of process. We also claim that it is not the intent of this rule to permit a defendant to come in many years after service and move to dismiss the action because the service was not made within sixty days. Certainly this rule does not supersede the above direct provision of the California Code. We believe also that the true intent of the rule is to give the defendant a summary remedy by applying for dismissal and prevent a plaintiff from filing a complaint and keeping an action alive against a defendant indefinitely. *We claim it was never intended to apply to cases like those before the court where the plaintiffs have for so many years been actively engaged in strenuous efforts to bring the cases to a final hearing and determination.*

SOME CALIFORNIA CASES.

In the case of Churchill v. Woodworth, 84 Pac. 155 (Cal.), the court spoke of the issuance of the summons,

saying: "On November 12, 1902, summons was issued upon the original complaint."

We made an examination of the transcript at the Los Angeles County Law Library and found that the summons was *dated* November 12, 1902, and was received by the sheriff December 25, 1902.

It will be seen that the court always speaks of the date of the summons as being the issuance of the summons.

In *Modoc v. Superior Court*, 128 Cal. 255, the court said:

"The summons was issued upon the complaint September 4, 1897, and a copy of the complaint was served upon the defendant August 7, 1899."

An examination of the transcript shows that the summons was *dated* September 4, 1897, but that it was not received by the sheriff until August 3, 1899—*nearly two years after its issuance*.

In the case of *Sharpstein v. Eels*, 132 Cal. 507, the court said:

"The summons was issued October 26, 1895, but was not served until February 6, nor returned until February 17, 1900."

An examination of the transcript shows that the summons was dated October 26, 1895, but that it was not received by the sheriff until January 29, 1900. In the briefs the parties all seem to concede that the date of issuance was the date of the summons.

In *Kennedy v. Mulligan*, 136 Cal. 556, the complaint was filed May 29, 1896. The summons was dated May

22, 1897. See transcript S. F. No. 2016. The service was made March 24, 1898.

The Supreme Court said:

"The summons *was issued within the year* and served within less than a year thereafter. No injury appears to have resulted to defendant, nor was he prevented by the delay from paying the judgment."

Fitman on Code Summons says:

"By issuing a summons we are not to be understood as meaning its delivery to the sheriff or other proper officer for service. As we understand it, a summons is issued when it is *prepared, signed by the clerk, and sealed with the court seal, and is in all respects complete for delivery to a proper officer for service.*" (Page 8.)

In Alderman on Judicial Writ and Process the author says, in speaking of the date of the summons: "Such date is *prima facie* evidence of the date when it is issued."

In re James, 99 Cal. 374: A collateral attack upon a decree of divorce rendered by the Circuit Court of Missouri upon constructive service of process. This decree of the Circuit Court of Missouri was, by the Supreme Court of California, held to be good as against a collateral attack. The contention was that no process was ever issued by the Missouri court for the reason that the order which constitutes the process *was not signed by the clerk.*

CASES OUTSIDE OF CALIFORNIA.

We particularly call attention to:

Webster v. Sharpe, 116 N. C. 466, and
Currie v. Hawkins, 118 N. C. 593.

In the Webster case the court says:

“The presumption is that it issued at the time it bears date, and the burden is on defendant to show that it did not.”

In the case at bar the plaintiff in error does not attempt to assume this burden and has made no showing whatever.

In the Currie case the court says:

“There remains to be disposed of the plea of the statute of limitations. The date of the issue of a summons when the matter is in dispute, depends upon the facts connected therewith. The presumption is in favor of its having been issued at the time it bears date. The defendant has introduced no testimony in this case tending to show the issuing of the summons was in fact after the date mentioned therein, and he relied *simply upon the fact that the sheriff's return showed that it was received two months and a half after its date, to prove that it was not issued on the day of its date. This fact alone does not rebut the presumption* that the summons was issued at the time of its date.”

UNITED STATES STATUTES AND CASES.

Section 911 of the Revised Statutes provides:

“All writs and process issuing from the courts of the *United States* shall be *under the seal of the court from which they issue* and shall be signed by the clerk thereof.”

Section 912 provides:

"All process issued from the courts of the United States shall bear teste from *the date of such issue.*"

If summons is not issued until given to the marshal then it must be given to him the day it is dated to comply with this section.

IF COUNSEL'S CONTENTION BE UPHELD THEN THE JUDGMENTS IN NUMBERLESS CASES WOULD BE INVALIDATED BECAUSE THE DATE OF THE TESTE AND THE DATE OF THE RECEIPT OF THE PROCESS BY THE MARSHAL WOULD HAVE TO BE THE SAME TO AVOID ATTACK.

We believe that in the federal courts of the United States there are hundreds of adjudicated cases which, if the contention of the plaintiff in error is correct, could be opened any time and motions made to set aside the judgments upon the ground that while the date of the summons is attested by the clerk within one year of the filing of the complaint, nevertheless, its actual delivery to the marshal was after the expiration of the year.

If such be the law judgments of great import throughout the United States, rendered years ago and since acted upon, are void on their face and can be and are now subject to collateral attack.

In construing section 911 of the Revised Statutes, the court in *Leas v. Merriam*, 132 Fed. 512, said:

"I think section 911 means *no more* than that when a writ of process *issues* from a federal court it *must be signed by the clerk and shall be authenticated in the manner therein set out.*"

No duty is imposed on the clerk to *also* deliver it to the marshal before he can say he has issued it.

In *Jewett v. Garrett*, Circuit Court, D., New Jersey, 47 Fed. Rep. 625, the court said:

"The statute governing the issue of writs and process from the courts of the United States requires that such writs and process shall be under the seal of the court, and shall be signed by the clerk thereof (Rev. St. U. S., Sec. 911); and there is a further requirement that all process must bear teste from the day of its issue (*Id.*, Sec. 912). Other than in these necessary particulars, neither the form of the writ or process, nor its contents, *nor the manner of its delivery to the marshal for service*, nor its formal drafting, *is sought to be controlled, or affected by any legislation of congress*, further than to ordain generally that the writ shall, as to those particulars, as far as possible, harmonize with, and be similar to, the writs and processes obtaining under the code of procedure of the state in which the court has jurisdiction."

In the case of *Van Dresser v. Oregon etc. Company*, 48 Fed. 205, the court said:

"The laws of the state providing for the service of process of the state courts in actions at law furnish the rules for procedure in such cases in this court, so that whatever would be lawful service of process to bring a party into court if the action were in court of competent jurisdiction under the *state* government, is lawful and sufficient for the purpose in actions commenced in this court."

CASES CITED BY PLAINTIFF IN ERROR.

We have examined the cases referred to in the brief of plaintiff in error, but they are not applicable to the

case now before the court. Most of the cases arise in jurisdictions where the summons or writ is made out by the attorney for the plaintiff and where it is held that an action is *commenced when the summons is issued* and where it is important to determine when an action is commenced so as to save the statute of limitations. In California an action is commenced when a complaint is filed. These cases turn upon the question of intention. If it is shown that there was a *bona fide* definite intention to bring the action at the time the writ or summons was made out and signed by the attorneys for plaintiff or by the clerk, the writ is considered issued. The real point in these cases is that a plaintiff cannot sue out a writ or have a summons issued and keep his claim alive so as to bar the statute of limitations, or, in other words, so as to commence an action until the proceedings have passed the place where the plaintiff or his attorney can suppress them and prevent any suit being commenced. These cases cannot apply to the specifications of error now before the court because this action was commenced by the *filing of the complaint. It is so provided by the rule of the Circuit Court and by the statutes of California.* The following are all of the cases cited by defendant and they fully bear out our position and are not in point upon the matters now before the court.

Hekla Insurance Co. v. Schroeder, 9 Ill. App.
472.

This case holds that an action is not commenced until summons is sued out, and that summons is not considered legally sued out until it is delivered to the

sheriff with the authority to make service, or it is transmitted to him for that purpose. The mere making out, signing and sealing the summons by the clerk and delivering to plaintiff or his attorney, is not the commencement of any suit so as to save the bar of the statute of limitations.

We understand, however, that in Illinois a summons can precede the filing of the complaint or declaration, so that it is within the power of plaintiff or his attorney *to suppress* the action at any time prior to the delivery of the summons to the sheriff with authority to serve it.

Pease v. Richie, 132 Ill. 638, 24 N. E. 433.

The statute provides that a judgment of a court of record shall be a lien on the real property of the person against whom it is obtained, in the county for which the court is held, for seven years from the time it is rendered; but provided, that when execution is not issued on a judgment within one year from the time it becomes a lien, it shall thereafter cease to be a lien.

* * * The clerk made out an execution within the year; but it was never delivered to the sheriff to execute, and when found, an endorsement was found on the back of the execution, "Not called for."

Held not a compliance with the statute.

The statute requires something more than the mere writing of an execution by the clerk and placing it among the files in his office.

Mills v. Corbitt, 8 How. Pr. 500.

Statute provided that an attachment could issue at any time after summons was issued, and it was held

that if the summons was made out and signed by the attorney, with the actual intention of having the same served, it was not necessary that it be delivered to the sheriff prior to the issuing of the attachment. We think the case turns on the question of intention.

Ross v. Luther, 4 Cowan (N. Y.) 158.

Action of debt against the sheriff for escape of prisoner from the jail limits.

Writ had been filled up sometime previous and left with clerk in the office of the plaintiff's attorney to be issued when he could ascertain that prisoner was off the limits. There was not an absolute intention that the writ should be delivered to the coroner in the first instance. It was committed to the clerk of the attorney to exercise his discretion. This discretion cannot be committed to an agent or messenger, and the suit was not commenced until the actual delivery to the coroner.

White v. Johnson, 27 Ore. 282, 40 Pac. 511.

The real question decided in this case is that no proper summons was issued and served upon the executrix of a defendant who had died after the filing of the complaint.

The court, however, takes up the question of the proper issuance of an attachment, and holds that under the laws of Oregon, which provide that an attachment cannot issue until after a summons is issued, that summons is not issued until delivery to the sheriff. It will be noticed, however, that in Oregon a summons is made out and signed by the plaintiff or his attorney and *not by the clerk*. We claim this case only goes so

far as to hold that the proof of intention to issue summons is established by its delivery to the sheriff, and falls within the same rule as the other cases cited by defendant, that the issuance of the summons is a question of intention. It may, however, be construed as going further in holding what can be considered evidence of such intention.

CONCLUSION.

We contend:

(a) That counsel for plaintiff in error has failed to establish the invalidity of the judgment.

(b) That the defendant in error complied with the statutes of California in causing the summons to be issued by the clerk December 16th, 1905—within one year from the date of the filing of the complaint (December 29th, 1904), and caused the same to be served July 7th, 1907, within three years from the date of filing the complaint.

(c) That the court below properly refused to set aside the default of the district entered September 12, 1907, in view of the fact that the application therefor was not made until June, 1912—nearly five years after the entry of the default, and no showing has been made that such refusal was an abuse of discretion.

That plaintiff in error has not shown that Judge Wellborn was in error in rendering the following decision:

“The issue raised at this hearing depends upon the law of California. (Revised Statutes of the United States, section 914.)

"The Supreme Court of said state, construing sections 405 and 406 of the Code of Civil Procedure, has held, that a summons is issued when the officer charged with its issuance has done all that the law requires him to do in reference thereto. (Cowell v. Stewart *et al.*, 69 Cal. 525.)

"The doctrine of this case, so far from being contrary to is impliedly sanctioned in Reynolds v. Page, 35 Cal. 296, 300, where the court says:

"The issuing of the summons intended is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting a valid service. * * * And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal.'

"The other California cases cited in defendant's brief do not relate to the point now under consideration; nor does Rule 7 of this court in any way conflict with the decision in Cowell v. Stewart, *supra*, and said decision, I hold, is the law applicable to the case at bar.

"This conclusion renders it unnecessary for me to review the other authorities cited in the briefs of the respective parties."

Respectfully submitted,

WILLIAM M. HIATT,

OSCAR C. MUELLER,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

L. V. WELLS,

Appellant,

vs.

J. B. LINCOLN, as Trustee in Bankruptcy of
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ORCHARD COMPANY, a Corporation,
Bankrupt,

Appellee,

and

J. B. LINCOLN, as Trustee in Bankruptcy of
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In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Transcript of Record.

Appeals from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

JAN 17 1914

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

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1002 Alaska Building, Seattle, Washington.

H. C. BELT, Esquire, Attorney for L. V. Wells, Claimant,

1002 Alaska Building, Seattle, Washington.

RAYMOND D. OGDEN, Esquire, Attorney for J. B. Lincoln, Trustee,

506 Lowman Building, Seattle, Washington.

WALTER SCHAFFNER, Esquire, Attorney for J. B. Lincoln, Trustee,

506 Lowman Building, Seattle, Washington.

[3*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Petition for Adjudication.

To the Honorable Judges of the Above-entitled Court:

The petition of the undersigned, all of whom are creditors and parties in interest herein, respectfully shows:

1. That Wenatchee Heights Orchard Company, a

*Page-number appearing at foot of page of original certified Record.

corporation, has for the greater portion of the six months next preceding the date of the filing of this petition had its principal place of business in the city of Seattle, State and district aforesaid, and owes debts to the amount of One Thousand Dollars and upwards and is insolvent.

2. That the said Wenatchee Heights Orchard Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business at Seattle, in said District, and that it is a business and commercial corporation and is not a municipal railroad, insurance or banking corporation.

3. That your petitioners are creditors of the said Wenatchee Heights Orchard Company, having claims against it amounting in the aggregate in excess of securities held by them to the sum of Five Hundred Dollars.

4. That none of your petitioners is entitled to priority of payment of his said claim within the meaning of Section 64 (b) of the United States Bankruptcy Act and amendments thereof; nor has any of your petitioners received a [4] preference within the meaning of Section 60 (a)-(b) of said law as amended.

5. That the nature and amount of your petitioners' claims are as follows:

(a) That heretofore these petitioners for value purchased from the said Wenatchee Heights Orchard Company certain real property, said property being situated in Chelan County, Washington, and being a portion of what is known and designated as We-

natchee Heights Orchard Tracts, together with a perpetual water right to irrigate said land to the extent of two acre feet of water per acre per year during the irrigation season of each year, to wit, from the first day of April to the first day of November of each year, as stated in certain written contracts executed and delivered by the said Wenatchee Heights Orchard Company, a corporation, to said purchasers, and that numerous and divers other persons hold water right deeds and contracts of like tenor and effect from the said Wenatchee Heights Orchard Company, a corporation, all of said deeds and contracts being substantially as shown by Exhibit "A" hereunto annexed and hereby referred to and made a part hereof.

(b) That the lands of all of the petitioners herein are dry and arid and require artificial irrigation to make such lands, or any portion thereof, valuable for agricultural or horticultural purposes, and that such lands without such artificial irrigation are without commercial value whatever, and that two acre-feet of water per acre per annum during said irrigation period of each year are necessary for the irrigation of said lands. [5]

(c) That the lands of all of the petitioners and divers and numerous persons holding water right deeds and contracts from the said Wenatchee Heights Orchard Company, a corporation, are planted to orchards which are either in bearing or are coming into bearing and require the full amount of two acre-feet of water per acre per annum for

the irrigation thereof during the irrigation season of each year.

(d) That the irrigation system of said Wenatchee Heights Orchard Company, a corporation, consists of seventy-eight shares (or perhaps more) of stock in the Spring Hill Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, the said Spring Hill Irrigation Company operating and maintaining an irrigation system on what is known as Wheeler Hill, located in Chelan County, Washington, in close proximity to the lands of the petitioners herein.

(e) That the interest of the said Wenatchee Heights Orchard Company, a corporation, in and to the waters of said Spring Hill Irrigation Company, as said irrigation is now maintained, is not sufficient to supply petitioners herein, and other persons holding said water right deeds and contracts from the said Wenatchee Heights Orchard Company, a corporation, with water equivalent to two acre-feet of water per acre per annum for the land of the petitioners and other persons, or any substantial part thereof, or in any amount exceeding one-third of the amount provided for in said water right deed and contracts, during said irrigation season.

(f) That at all times since the execution and delivery of said water right deeds and contracts the said Wenatchee Heights Orchard Company, a corporation, has failed and refused to supply to the persons entitled thereto water as provided [6] in

and by said water right deeds and contracts (including these petitioners) the amount of water named in said deeds and contracts, or water in any amount exceeding one-third of the amount named in said deeds and contracts.

(g) That in addition to the failure and refusal of the said Wenatchee Heights Orchard Company, a corporation, to supply the said lands of these petitioners and said sundry other persons with the water provided for in and by said water right deeds and contracts and required by said lands, the said Wenatchee Heights Orchard Company, a corporation, has failed and refused, and does now fail and refuse to give said lands and the trees planted therein and the other improvements upon said lands, the cultivation, pruning, spraying and care provided for in said contracts, and in some instances has failed and refused to exercise the proper care in the planting of trees in said lands.

(h) That the said Wenatchee Heights Orchard Company, a corporation, has not paid the taxes and assessments upon the said lands to the extent required by said contracts, and that the unpaid and delinquent taxes which said corporation should pay and has not paid amount at this time to at least \$1,200.00, as will more fully appear from the records in the office of the County Treasurer of said Chelan County.

(i) That in the case the claims of the petitioning creditors are founded upon express contracts in writing, as hereinbefore alleged, and that the claims of the petitioners, though unliquidated, are each

founded upon said express contracts and are provable claims under the provisions of the United States Bankruptcy Act and amendments thereof; that the lands of petitioners and the least amount of damages [7] to which petitioners contend they are entitled by reason of the aforesaid neglect, failure and refusal of said Wenatchee Heights Orchard Company, a corporation, to perform its contracts as hereinbefore set forth are particularly set forth in Exhibit "B" hereunto annexed and hereby referred to and made a part hereof.

(j) That in addition to the claims mentioned in said Exhibit "B," Jeane Sage Hotchkin, one of said claimants, has a demand for the default of said Wenatchee Heights Orchard Company, a corporation, to irrigate her said lands for the year 1909, which demand has heretofore been sued on by the said Jeane Sage Hotchkin in the Superior Court of the State of Washington for said Chelan County, and in said suit liquidated in the sum of \$1,750.00, or thereabouts, and judgment accordingly entered in said Superior Court.

(k) That each and all of the claims of these petitioners (except the \$1,750.00 claim of the said Jeane Sage Hotchkin) are in legal effect the same as the said \$1,750.00 judgment claim of the said Jeane Sage Hotchkin, and that these petitioners do here and now apply to the Court that their said claims (with the exception of the said \$1,750.00 judgment demand in favor of the said Jeane Sage Hotchkin) be liquidated in such manner as this Court shall direct, the petitioners here and now suggesting to the Court

that said unliquidated claims be liquidated at the trial of this cause, if trial be had; and that after said liquidation said claims may be proved and allowed against the estate of said bankrupt; that said claims are each provable demands against the estate of the said bankrupt. [8]

6. And your petitioners further represent that the said Wenatchee Heights Orchard Company, a corporation, while insolvent and within four months next preceding the date of this petition, committed an act of bankruptcy in that heretofore and on, to wit, the 17th day of January, 1913, because of insolvency, a receiver was put in charge of its property under the laws of the State of Washington by the Superior Court of the State of Washington for King County, in that certain cause then and theretofore and now pending in said court, entitled "William P. McElwain and F. E. Ryer as Plaintiffs, Against the said Wenatchee Heights Orchard Company, a Corporation, and Others, as Defendants," said cause bearing No. 91,741 upon the records of said court.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon the said Wenatchee Heights Orchard Company, a corporation, as provided in the Acts of Congress relating to bankruptcy, and that said corporation may be adjudged a bankrupt within the purview of said acts, and that the unliquidated provable claims of the petitioners herein against the said bankrupt

be liquidated in such manner and at such time as this Court may direct.

J. B. LINCOLN,
Petitioner.

H. P. JOHNSTON,
Petitioner.

W. W. WHITE,
Petitioner.

RAYMUND D. OGDEN,
Attorney for Petitioners. [9]

United States of America,
Western District of Washington,
Northern Division,—ss.

J. B. Lincoln, H. P. Johnston and W. W. White, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are correct.

[Seal] WM. J. TAYLOR,
Notary Public in and for the State of Washington,
Residing at Seattle. [10]

Exhibit "A"—Fruit Land Contract.

It is hereby agreed by and between the Wenatchee Heights Orchard Company, a corporation, hereinafter called the grantor, and hereinafter called the grantee, that the said grantor will sell to the said grantee and that said grantee will purchase of the said grantor the following described tract of land situated in Chelan County, State of Washington, and particularly described as follows, to wit: Tract Number, Block Number of

Wenatchee Heights Orchard Tracts, Chelan County, Washington, according to the recorded plat thereof, together with a perpetual right appurtenant to said land to the use of water as hereinafter provided, together with the appurtenances, on the following terms:

First, the purchase price is dollars, of which the sum of dollars has this day been paid as earnest, the receipt whereof is hereby acknowledged by grantor, and the further sum of dollars each and every month thereafter until the full purchase price has been paid at the office of the Treasurer of the grantor, or at a depository designated by him, on or before the first business day of each calendar month until fully paid.

Second. The grantor shall plow and prepare said land for orchard use and shall plant it to orchard of standard varieties of fruit. Thereafter until full payment of said purchase price and until the election of the grantee to take possession as hereinafter provided, the grantor shall remain in possession of said premises and shall cultivate, irrigate, prune, spray and care for the same, and shall receive the crops from said land in lieu of interest on unpaid balance of purchase price, taxes and all assessments which may be levied or may accrue against said lands or for any part thereof, from this day until possession is delivered to the grantee as hereinafter provided, and as compensation for caring for said premises as aforesaid.

Third. The grantee may at any time elect to take

possession of said premises and upon such taking of possession the grantee shall pay interest on deferred payments at the rate of seven per cent per annum, and the grantor shall be relieved from all duty of further cultivating or caring for said premises or the said orchard, and from paying taxes or assessments thereon; Provided, that if said grantee shall not in any year have taken possession of said premises prior to the first day of March, in such year, he shall not have the right to take possession until after the first day of December of such year; Provided further, That the grantee shall in every case take possession within years after full payment as aforesaid.

Fourth. The grantor agrees to furnish water for irrigation purposes for the said premises to the amount of two (2) acre feet of water per acre for acres thereof during the irrigation season beginning April first and ending November first of each year, said water to be taken from the ditches, pipes or flumes of the grantor either at the boundary line of said premises or on said premises if any ditch, pipe or flume of the grantor crosses the same, subject to the reasonable regulation as to the place of taking and time and manner of such use by and under the supervision of the water superintendent of the grantor and subject to a yearly maintenance fee to be paid by the grantee to the grantor in such amount as shall be fixed by the grantor, but not exceeding Two dollars (\$2.00) per acre. [11]

Fifth. Said land and water to be conveyed by a good and sufficient deed to said grantee when said purchase price shall have been fully made. Said

conveyance shall contain the same terms, provisions and reservations as to the said premises, water rights, maintenance fee, right of way, liability, etc., as are set forth in this contract.

Sixth. The grantor shall not be held liable hereunder for any default or damage caused by the act of God, inevitable accident or any extraordinary or unusual action of the elements.

Seventh. The grantor reserves the perpetual right of way to construct, maintain and operate on and across said premises ditches, flumes and pipe lines at such points as shall be determined to be necessary by the water superintendent of said grantor.

Eighth. Time is of the essence of this contract, and in case of a failure of the said grantee to make any payment or perform any covenant herein made, this contract shall be forfeited and determined at the option of the said grantor, the failure of the said grantor to exercise said option for any default not to be construed a waiver of this provision as to any subsequent default. In case of said forfeiture the grantees shall execute to the grantor a quitclaim deed to all his rights and title to the said premises in consideration for which the grantor shall give its bond to the grantee for the full amount paid on this contract, at the date of forfeiture, less dollars said bond to bear five per cent per annum simple interest, principal and interest payable ten years after the date of issue of said bonds.

Ninth. Where the words grantor or grantee appear, it shall be held to include heirs, assigns, suc-

cessors or other legal representatives.

Witness our hands and seals in duplicate, this
day of A. D. 19. . . .

Signed, sealed and delivered in presence of:

..... [Seal]

..... [Seal]

[12]

Exhibit "B" [List of Claims].

Claimant	Approximate Acreage.	Claim.
E. S. Hager.....	5	\$ 500.00
R. M. Ragsdale.....	11	1,100.00
A. T. Sutton.....	15	1,500.00
John B. Sutherland.....	10	2,000.00
George W. Steinacker.....	13	1,300.00
J. S. Goelcher.....	2	400.00
P. F. Vian.....	10	2,000.00
J. P. Fitzgerald.....	5	1,000.00
W. W. White.....	7	1,400.00
F. B. Cospers.....	10	1,000.00
W. F. Kuhlman.....	14	2,800.00
J. B. Lincoln.....	9	1,800.00
R. H. Hotchkin.....	11	2,200.00
Jean Sage Hotchkin.....	16	3,200.00
D. M. Archibald.....	8	1,600.00
J. E. McDowell.....	5	1,000.00
E. A. Born.....	15	3,000.00
Helmer Johnson.....	5	1,000.00
J. L. Bean.....	7	1,400.00
H. T. Harding.....	17	3,400.00
Edna H. Wosker.....	5	1,000.00

[Indorsed]: Petition for Adjudication. Filed in the United States District Court, Western District of Washington. Jan. 18, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [13]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

Order of Adjudication.

At Seattle, in said District, on the 23d day of April, A. D. 1913, before the Honorable Edward E. Cushman, Judge of said Court in bankruptcy, the petition of H. P. Johnstone, J. B. Lincoln and W. W. White, praying that Wenatchee Heights Orchard Company be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and the answers thereto of said Wenatchee Heights Orchard Company and H. F. Butman, Receiver, together with the report of John P. Hoyt, the Special Master to whom said petition and answers and the issues raised thereby were referred, and the exceptions to said report, having been heard and duly considered,—

IT IS ORDERED, That the said exceptions be and they are, and each of them is, hereby overruled and denied, and that the said Wenatchee Heights

Orchard Company is hereby declared and adjudged bankrupt accordingly.

WITNESS the hand of Honorable EDWARD E. CUSHMAN, Judge of said Court, and the seal thereof, at Seattle, in said District, on the 23d day of April, A. D. 1913.

[Seal]

FRANK L. CROSBY,
Clerk.
B. O. Wright,
Deputy.

Enter: EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Order of Adjudication. Filed in the United States District Court, Western District of Washington. Apr. 23, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [14]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,
Bankrupt.

Order of Reference.

WHEREAS, The Wenatchee Heights Orchard Company of Seattle, in the County of King and District aforesaid, on the 23d day of April, A. D. 1913, was duly adjudged a bankrupt upon a petition filed in this Court against it on the 18th day of January,

1913, according to the provisions of the Acts of Congress relating to bankruptcy;

It is thereupon ORDERED, That said matter be referred to John P. Hoyt, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court, and the seal thereof, at Seattle, in said District, on the 23d day of April, 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

B. O. Wright,

Deputy.

Enter: EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Order of Reference. Filed in the United States District Court, Western District of Washington. Apr. 23, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [15]

[Claim of L. V. Wells.]

[Note Dated September 21, 1911, for \$57,000.]

\$57,000.

Wenatchee, Wash., Sept. 21, 1911.

Ninety days after date, without grace we promise to pay to the order of L. V. Wells Fifty-seven Thousand Dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin, at the rate of 7 per cent, per annum from date hereof until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal

and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof we promise and agree to pay, in addition to the costs and disbursements provided by statute a reasonable sum Dollars in like Gold Coin, for attorney's fees in said suit or action.

Due 190...

At

No.

WENATCHEE HEIGHTS ORCHARD
CO.

By L. V. WELLS,

President.

[Seal]

By E. H. McPHERSON,

Secretary.

[Endorsed on back as follows]: Without recourse.

L. V. WELLS. [15a]

[Note, Dated September 21, 1911, for \$20,708.31.]

\$20,708.31 Wenatchee, Wash., Sept. 21, 1911.

Ninety Days after date, without grace we promise to pay to the order of L. V. Wells Twenty Thousand, Seven Hundred Eight and 31/100 Dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin, at the rate of 7 per cent, per annum from date hereof until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immedi-

ately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof we promise and agree to pay, in addition to the costs and disbursements provided by statute a reasonable sum Dollars in like Gold Coin, for attorney's fees in said suit or action.

Due 190...

At

No.

WENATCHEE HEIGHTS ORCHARD
CO.

By L. V. WELLS,

President.

[Seal]

By E. H. McPHERSON,

Secretary.

[Endorsed on back as follows]: Without recourse.

L. V. WELLS. [15b]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

IN BANKRUPTCY—No. —.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

PROOF OF UNSECURED DEBT.

At Wenatchee, in the State of Washington, on the 10th day of May, A. D. 1913, came L. V. Wells, of Wenatchee, in the County of Chelan, in said State of Washington, and made oath and says that Wenatchee

Heights Orchard Company, the corporation against whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Seventy-three Thousand, Seventy-one and 26/100 Dollars, with interest on \$77,708.31 at 7% per annum from Sept. 21, 1911; that the consideration of said debt is as follows: Two promissory notes dated Sept. 21, 1911, for \$57,000 and \$20,708.31, respectively, given upon an account stated, also cash advanced for which no note was taken, as follows: Aug. 12, 1912, \$1000; Oct. 11, 1912, \$700; Dec. 1, 1912, \$250; interest on \$3,000, due to Netherlands American Bank in April and October, 1912; \$214.20, interest on note to Talens due in October, 1912, \$120; interest on \$2,250, balance to Netherlands American Bank, \$78.75; that no part of said debt has been paid; that there are no setoffs or counterclaims to the same except that the property of said bankrupt known as the "Ryer Homestead" has been mortgaged for the benefit of claimant, and it is estimated that \$7,000 would release said property from said mortgage and that said deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever. [16]

And said creditor requests that all notices to which he may be entitled shall be addressed to him in care of H. C. Belt, Alaska Building, Seattle, Washington.

L. V. WELLS,
Creditor.

Subscribed and sworn to before me this 10th day of May, A. D. 1913.

[Seal]

JOHN E. PORTER,
Notary Public for State of Washington, Residing at
Wenatchee. [17]

[Endorsed]: Claim of L. V. Wells. Filed June 4th, 1913, 1 P. M., John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Oct. 21, 1913. Frank L. Crosby, Clerk. [17½]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

**Objections of the Trustee to Allowance of Claim of
L. V. Wells.**

Comes now J. B. Lincoln, the duly elected, qualified and acting Trustee of the above-named bankrupt, and objects to the allowance of the claim of L. V. Wells heretofore filed herein for the sum of \$73,071.26, and for grounds of such objections shows the following:

I.

That the notes attached to said proof of claim and upon which the same is based were executed without any consideration whatever.

II.

That the note for \$57,000.00 dated 21st day of September, 1911, attached to said proof of claim and upon which the said claim is in part based, has been fully paid and satisfied.

III.

That nothing whatever is due to the said L. V. Wells from said Wenatchee Heights Orchard Company, but that, on the contrary, the said L. V. Wells is indebted to said Wenatchee Heights Orchard Company and was at the time of the filing of the petition herein in the sum of \$75,000.00 for his subscription to the capital stock of said bankrupt. [18]

IV.

That the sum of \$40,000 of said claim was based upon an alleged agreement whereby said L. V. Wells sold to the Wenatchee Heights Orchard Company certain real estate together with 63 shares of the capital stock of the Spring Hill Irrigation Company, and was to receive in payment therefor 750 shares of the capital stock of said Wenatchee Heights Orchard Company, and there was to be paid to said Wells the sum of \$40,000 and to certain other parties mentioned in said agreement the sum of \$22,240; that in truth and in fact the said land sold to said Wenatchee Heights Orchard Company by said L. V. Wells was not worth to exceed the sum of \$50,000; that at the time such sale was made said L. V. Wells was the President and one of the Trustees of the Wenatchee Heights Orchard Company and the owner of all the capital stock, and one E. H. McPherson, who, according to said agreement was to receive

the sum of \$5,850, was the only other Trustee or officer of said corporation when said agreement was made; said L. V. Wells and E. H. McPherson knew that said land was worth not to exceed the sum of \$50,000, and said contract was entered into by them on behalf of the Wenatchee Heights Orchard Company and themselves fraudulently and with the design and purpose of causing it to appear that the said capital stock of the Wenatchee Heights Orchard Company was fully paid, whereas, in truth and in fact, nothing whatever was ever paid thereon.

V.

That the said L. V. Wells is the legal owner and holder of 375 shares of the capital stock of the Wenatchee Heights Orchard Company of the par value of \$37,500, on which nothing has been paid, and that said Wells is now indebted [19] to the bankrupt in said sum of \$37,500 for said stock.

VI.

That a large part of said claim is based upon a claim for commission at 15 per cent upon all the lands sold by said bankrupt by reason of a certain resolution passed by the Board of Trustees of said bankrupt on the 30th day of March, 1907, at a time when the sole officers, trustees and stockholders were said L. V. Wells and E. H. McPherson, by which said E. H. McPherson and L. V. Wells were jointly allowed a commission on all lands to be sold by the company of 15 per cent; that in truth and in fact no such resolution was ever adopted by said Board of Directors so far as appears from the minutes of said corporation, but this Trustee further alleges that if

any such resolution was adopted, the same was adopted fraudulently and that said commission of 15 per cent was grossly excessive, and that a fair commission, if any is to be allowed for the sale of the property of the Wenatchee Heights Orchard Company, is not to exceed 5 per cent.

VII.

That said L. V. Wells is indebted to the bankrupt herein in a large sum of money, the exact amount of which the Trustee is not now able to ascertain, from moneys illegally and improperly withdrawn by him for and on account of said commissions claimed by him.

Wherefore, the Trustee prays that the said claim may be wholly disallowed.

R. D. OGDEN and

WALTER SCHAFFNER,

Attorneys for Trustee. [20]

State of Washington,
County of King,—ss.

Walter Schaffner, being first duly sworn, deposes and says that he is one of the attorneys for J. B. Lincoln, as Trustee herein, that he has read the foregoing objections, knows the contents thereof and believes the same to be true.

WALTER SCHAFFNER.

Subscribed and sworn to before me this 16th day of June, 1913.

[Seal]

ETHEL CURRIER,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Objections to Claim of L. V. Wells. Filed June 17, 1913, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western Dist. of Washington, Oct. 21, 1913. Frank L. Crosby, Clerk. By _____, Deputy. [21]

Order [of Referee Allowing Claim of L. V. Wells in the Sum of \$50,389.16, etc.].

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation,
Bankrupt.

This matter coming on to be heard upon the claim of L. V. Wells, together with the objections of the Trustee heretofore filed thereto, and the Court having heard the evidence offered both in support of said claim and in support of the objections thereto, and being now fully advised in the premises, finds that the account between the said Wells and the alleged bankrupt herein stands as follows:

Cr.

Note dated March 9, 1907.....	\$40,000.00
Int. at 7% 5 yrs. 10 mos. 9 days to Mar.	
18, 1913	16,473.28
Loan, June 25, 1907.....	4,000.00
Int. at 7% 6 yrs. 6 mos. 24 days.....	1,558.66
Loan, April 10, 1908.....	3,000.00
Int., 4 yrs. 9 mos. 8 days at 7%.....	1,044.22

Loan, April 26, 1910.....	2,200.00
Int. at 7% 2 yrs. 8 mos. 23 days.....	110.98
Loan December, 1911	1,150.00
Interest at 7% 1 year 1 mo. 6 days.....	88.55
Loan August 12, 1912.....	1,000.00
Loan October 11, 1912.....	700.00
Loan December 1, 1912.....	250.00
Advanced for interest on mortgage.....	214.20
“ “ “ “ “	120.00
“ “ “ “ “	78.75

Total.....\$71,988.64

[22]

Total Cr. Forward..\$71,988.64

Dr.

Total payments, \$11,955.05		
Less expense, 1,495.90		
	<hr/>	
	\$10,459.15	
1½ Auto	750.00	
Payment Aug. 23, 1911	4,000.00	
Int. 1 yr. 4 mos. 25 days		
to January 18, 1913	390.33	
Colby Contract	700.00	16,299.48
	<hr/>	
		\$56,389.16

The Court further finds that the transfer of certain property to the Wenatchee Heights Orchard Company by said L. V. Wells on the 9th day of March, 1907, was a valid contract and conveyance and for a fair consideration, and that the note of Forty Thousand Dollars (\$40,000.00) given in partial payment

thereof by the bankrupt to said L. V. Wells was a valid note and is now a valid outstanding obligation of said bankrupt.

And the Court further finds that the contract attempted to be entered into between the said bankrupt and L. V. Wells and E. H. McPherson on the 30th day of March, 1907, whereby the said Wells and McPherson were to receive fifteen per cent (15%) upon all land sold by the company, is invalid and of no force and effect, that the said Wells is not entitled to claim anything thereunder.

IT IS THEREFORE ORDERED, That the objections numbered one, two, three, four and five of the said Trustee to the allowance of the claim of L. V. Wells be and the same are, and each of them is, hereby overruled; [23]

AND IT IS FURTHER ORDERED, That the objections numbered six and seven be, and they are hereby, sustained to the extent of holding the said contract of March 30, 1907, invalid and to the extent of charging said L. V. Wells with all moneys or property received by him during the existence of said corporation or deducting the same from the amount of the indebtedness of said company to him.

IT IS FURTHER ORDERED, That the said claim of L. V. Wells be, and the same is hereby allowed in the sum of Fifty-six Thousand Three Hundred Eighty-nine and 16/100 Dollars, (\$56,389.16).

The foregoing order is made without prejudice to the right to offset against the claim of said Wells now allowed such amount as may hereafter be determined to be properly chargeable to said Wells on ac-

count of a certain contract belonging to the bankrupt and transferred to the First National Bank of Wenatchee as collateral, and also to charge against said claim as now allowed such amount as may hereafter be determined by reason of the mortgaging of certain property of the bankrupt for the benefit of the said Wells and more fully shown by the testimony in exhibits herein.

Dated at Seattle, Washington, this 15th day of October, A. D. 1913.

JOHN P. HOYT,
Referee.

O.K. as to form.

H. C. BELT.

[Indorsed]: Order Re Claim of L. V. Wells. Filed Oct. 15, 1913, 1 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Oct. 21, 1913. Frank L. Crosby, Clerk. By ————, Deputy. [24]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of the WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

**Petition [of Trustee for Certification of Proceedings,
etc., to District Court].**

To the Honorable John P. Hoyt, Referee:

Your petitioner, J. B. Lincoln, the duly appointed,

qualified and acting Trustee of the above-named bankrupt, respectfully represents that on the 15th day of October, 1913, an order was entered allowing the claim of L. V. Wells in the sum of Fifty-six Thousand Three Hundred Eighty-nine and 16/100 Dollars (\$56,389.16), and your petitioner further represents that in said order and in the proceedings and record therein there is manifest error in this:

1. The Referee erred in overruling objection number one of the Trustee to said claim.

2. The Referee erred in overruling objection number two of the Trustee to said claim.

3. The Referee erred in overruling objection number three of the Trustee to said claim.

4. The Referee erred in overruling objection number four of the Trustee to said claim.

5. The Referee erred in overruling objection number five of the Trustee to said claim.

6. The Referee erred in allowing said claim in the sum of \$56,389.16 or in any other sum whatsoever.

7. The Referee erred in holding that the conveyance of property by said Wells to Wenatchee Heights Orchard Company on [25] the 9th day of March, 1907, was for a valid and fair consideration.

8. The Referee erred in holding that the note of Forty Thousand Dollars (\$40,000.00), given by the bankrupt to said L. V. Wells on the 9th day of March, 1907, was for a fair consideration.

9. The Referee erred in not holding that the conveyance of the property to the corporation by said Wells on or about the 9th day of March, 1907, was a fraudulently gross over-valuation.

10. The Referee erred in not holding that the said Wells was indebted to said corporation in the sum of Seventy-five Thousand Dollars (\$75,000.00) for his subscription to the capital stock of said company.

11. The Referee erred in not holding that the note of Fifty-seven Thousand Dollars (\$57,000.00) mentioned in the proof of claim of said L. V. Wells was fully paid and satisfied.

WHEREFORE, the Trustee prays that the order, record and proceedings aforesaid may be certified to the Judge of this court for his opinion.

J. B. LINCOLN,
Trustee.

State of Washington,
County of King,—ss.

Walter Schaffner, being first duly sworn, on oath says: That he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

WALTER SCHAFFNER.

Subscribed and sworn to before me this 15th day of October, 1913.

[Seal] RAYMOND D. OGDEN,
Notary Public in and for the State of Washington,
Residing at Seattle. [26]

[Endorsed]: Petition for Review. Filed Oct. 16th, 1913, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Oct. 21, 1913. Frank L. Crosby, Clerk.
[27]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS OR-
CHARD COMPANY, a Corporation,
Bankrupt.

**Petition of L. V. Wells for Review [by District
Court].**

To the Honorable John P. Hoyt, Referee in Bank-
ruptcy.

Your petitioner, L. V. Wells, respectfully shows:

That your petitioner did on June 4, 1913, file a
proof of claim in the above-entitled cause whereby he
claimed an indebtedness from the said bankrupt to
himself in the sum of \$73,071.26, with interest on
\$77,708.31 at 7% per annum from September 21,
1911, up to the date of bankruptcy.

That on the 15th day of October, 1913, an order
was entered allowing the same claim in the sum of
\$56,389.16, and disallowing the said claim as to the
remainder.

That such order was and is erroneous in the fol-
lowing particulars:

1. The Referee erred in refusing to allow that por-
tion of the said claim which was founded upon a
note of the said bankrupt dated January 2, 1908, for
\$10,911.62 with interest at the rate of 7% per annum
from said date; the note having been given as a bal-
ance for commissions earned by this petitioner up to

that date over the above charges and withdrawals under a contract made with the said bankrupt pursuant to a resolution dated March 30, 1907. [28]

2. The Referee erred in refusing to allow that portion of the said claim which was founded upon a note of the said bankrupt dated January 2, 1909, for \$2,439.67, with interest at the rate of 7% per annum from said date; the said note having been given as a balance for commissions earned by this petitioner up to that date over and above charges and withdrawals under a contract made with the said bankrupt pursuant to a resolution dated March 30, 1907.

3. The Referee erred in charging against this petitioner the sum of \$686.80, being moneys withdrawn from the said bankrupt by this petitioner during the years 1906 and 1907 on account of commissions earned.

4. The Referee erred in charging against this petitioner the sum of \$3,622.35, being moneys withdrawn from the said bankrupt by this petitioner during the year 1908 on account of commissions earned.

5. The Referee erred in charging against this petitioner the sum of \$1,800.00, being moneys withdrawn from the said bankrupt by this petitioner during the year 1910 on account of commissions earned.

6. The Referee erred in charging against this petitioner the sum of \$1,800, being moneys withdrawn from said bankrupt by this petitioner from January 1, 1911, to October 1, 1911, on account of commissions.

7. The Referee erred in charging against this petitioner the sum of \$1,800, being moneys withdrawn

from said bankrupt by this petitioner from October 1, 1911, to December 31, 1911, on account of commissions earned. [29]

8. The Referee erred in charging against this petitioner the sum of \$1,500, being the amount paid during the year 1909, for an automobile for use in the company's business.

9. The Referee erred in holding that this petitioner is not entitled to claim anything on account of commissions for the sale of real estate sold for the bankrupt.

WHEREFORE your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the bankruptcy acts and the orders and rules and practice of this Court.

CORWIN S. SHANK,
H. C. BELT,
Attorneys for Petitioner.

State of Washington,
County of King,—ss.

H. C. Belt, being first duly sworn, upon oath deposes and says: I am an attorney for the above-named petitioner and make this verification for and on behalf of said petitioner, for the reason that said petitioner is without the Western District of Washington. I have read the foregoing petition, know the contents thereof and believe the same to be true.

H. C. BELT.

Subscribed and sworn to before me this 18th day of October, 1913.

[Seal]

LUCAS C. KELLS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy hereof received this Oct. 20, 1913.

R. D. OGDEN,
WALTER SCHAFFNER,
Attorneys for Trustee. [30]

[Indorsed]: Petition of L. V. Wells for Review.
Filed Oct. 20, 1913, 2 P. M. John P. Hoyt, Referee.
Filed in the United States District Court, Western
District of Washington, Oct. 21, 1913. Frank L.
Crosby, Clerk. By —————, Deputy. [31]

[Decision of U. S. District Court.]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS OR-
CHARD COMPANY, a Corporation,
Bankrupt.

Filed December 3, 1913.

WALTER SCHAFFNER, for Trustee.

RAYMOND D. OGDEN, CORWIN S. SHANK, H.
C. BELT, for Claimants, Wells and McPherson.

CUSHMAN, District Judge.

Hearings were had before the Referee upon objec-
tions to the claims of L. V. Wells and E. H. McPher-

son, and the petition of the Trustee for leave to use the funds belonging to the estate of the bankrupt, for the purpose of complying with an order of the Public Service Commission of the State of Washington, made against said corporation before it was adjudicated a bankrupt, which order required the corporation to increase the supply of water for irrigation of the lands sold by it.

The Referee allowed the claims in part; disallowed a part and denied the petition of the Trustee. Both the claimants and trustee pray a review of the Referee's decision. For the reasons given by the Referee in his opinion, his order is affirmed and approved, except as stated herein. [32]

The claimants, L. V. Wells and E. H. McPherson, organized the Wenatchee Heights Orchard Company in 1906. They have since continued to be the sole stockholders and controlling officers of that company. That corporation, for the stock issued, acquired some twelve hundred acres of land near Wenatchee, a large part of which was suitable for orchards and capable of irrigation, together with certain shares of stock in an irrigation company.

The lands were, when acquired by the company, subject to a fifty thousand dollar mortgage, which was assumed by the company. In addition to the stock, the company agreed to pay, as part of the purchase price of the land, claimant Wells \$40,000 and claimant McPherson \$5,850. It is the allowance by the Referee of the residue of these amounts and interest of which the trustee complains.

A brief statement of the transactions prior to bank-

ruptcy is necessary. The lands of the company were platted for sale into five and ten acre tracts. To irrigate them, it was necessary to obtain water of the company in which the Wenatchee Heights Orchard Company held stock.

By the end of 1911, all but a few acres of the irrigable lands had been sold. The contracts under which the lands were sold provided for a "perpetual right, appurtenant to the said land, of the use of water * * *.

"4. The grantor agrees to furnish water for irrigation purposes for the said premises to the amount of two (2) acre-feet of water per acre * * * during the irrigation season * * * .

"5. Said land and water right to be conveyed by a warranty deed to said grantee when said purchase price shall have been fully made * * * ."

The grantor was to plow the ground; plant the orchards; cultivate, irrigate and care for them and pay the taxes until [33] the purchase price was fully paid.

In 1911, the Wenatchee Heights Orchard Company began trading its contracts with the purchasers of these tracts for real estate in and near Seattle, Washington. All of the contracts were, in a short time, exchanged.

In 1911, the company moved its office from Seattle to Wenatchee. In the same year suit was brought against the company by one of its contract holders for damages on account of a failure to furnish the agreed amount of water for irrigation. A judgment

for Twelve Hundred Dollars was obtained in the course of the year and paid by the bankrupt.

In 1912, a similar suit was brought by another contract holder, who obtained a judgment for Two Thousand Dollars. This suit was appealed. In the same year, upon complaint of other contract holders, after a hearing, the Public Service Commission of the State of Washington found the water supply insufficient to furnish the water provided for in the deeds and contracts of the company and ordered the corporation to so increase the water supply as to furnish it. This was not done.

Some time prior to December 5, 1911, the Summit Investment Company was incorporated. The claimant L. V. Wells caused all of its stock, save one share, to be issued, or transferred, to one B. E. Gates, who had theretofore, as agent, assisted in selling some of the orchard tracts of the Wenatchee Heights Orchard Company—the one remaining share being issued to the wife of Gates.

While Gates had, theretofore, been engaged as stated, and there may have been a small balance due him upon some of his transactions with the Wenatchee Heights Orchard [34] Company, it is clear from the testimony that the stock in the Summit Investment Company was given to him without consideration. Gates became president and his wife secretary and treasurer of that company. The only property ever held by it was transferred to it by the Wenatchee Heights Orchard Company.

New ninety day notes were made out by the Wenatchee Heights Orchard Company to claimants

L. V. Wells and E. H. McPherson, dated September 21, 1911, which notes included the residue of the original indebtedness, which has been allowed by the Referee.

Under date of October 10, 1911, the minutes of a stockholders' meeting of the Wenatchee Heights Orchard Company, signed by the claimants, L. V. Wells and E. H. McPherson embody the following letter addressed to that company on the letter-head of B. E. Gates and signed by him:

“Having purchased the following promissory notes made by your Company, viz., one dated Sept. 21, 1911, to L. V. Wells for \$57,000, due ninety days from date, and one dated Sept. 21, 1911, to E. H. McPherson for \$18,000, due ninety days from date, and being desirous of collecting the same, I propose to take the following described property in full satisfaction of the said notes and accumulated interest: * * *

I agree to assume the mortgages against the above property, amounting to \$33,500.”

The minutes then continue:

“After careful consideration of the proposal, on motion duly made by a stockholder, seconded and unanimously carried, all stock voting in favor, it was decided to accept the said proposal.

* * *

L. V. WELLS,
E. H. McPHERSON.”

The minutes of a special meeting of the Trustees of the Wenatchee Heights Orchard Company, held the same date, read:

“Whereas, the proposal of B. E. Gates to accept certain property of the company in payment of notes given by the company to L. V. Wells and E. H. McPherson and held by him, having been accepted by the stockholders, therefore,
[35]

Resolved, that the President and Secretary be and are hereby authorized to complete the transfer in accordance with said proposal. * * *

E. H. McPHERSON,

Secretary.

L. V. WELLS,

President.”

The minutes of a special meeting of the Board of Trustees, under date of December 7, 1911, read:

“Upon motion duly made by a trustee, and seconded, the following resolution was unanimously adopted:

‘Whereas, the trustees and stockholders of the company have hertofore accepted a proposition made by B. E. Gates to exchange certain property for notes given by the company to L. V. Wells and E. H. McPherson, and

‘Whereas, a request has been received from the said B. E. Gates, that the above property be deeded to the Summit Investment Company.

‘Resolved, that the President and Secretary be and are hereby authorized to execute the necessary deeds as referred to in a resolution adopted by the trustees on Oct. 10, 1911, to the

Summit Investment Company, instead of to B. E. Gates.' * * *

"E. H. McPHERSON,
Secretary.

L. V. WELLS,
President."

In accordance with these resolutions, transfers were made to the Summit Investment Company.

Claimants Wells and McPherson both testified that they never parted with the notes mentioned in these minutes; that they were not purchased by, or assigned to Gates, and were never surrendered by claimants or cancelled at the time of the transfer of the real property to the Summit Investment Company, or at all. E. H. McPherson testifies:

"Q. Now, at the time of these transactions, who held these notes?

A. Well, to explain the whole situation; of course, we still held the notes. It was simply a means of transferring this property out of the hands of the Wenatchee Heights Orchard Company to the Summit Investment Company. [36]

Q. Was there any change in the physical possession of that property?

A. Not at all.

Q. Did you ever hand the notes over to Mr. Gates? A. No.

Q. Mr. Gates never had them at all?

A. Never had them.

Q. And they weren't cancelled and new notes issued? A. No, they were not cancelled.

Q. The whole transaction was merely a fiction

except so far as the property was transferred?

A. The property was transferred to get it out of the hands of the Wenatchee Heights Orchard Company.

Q. But the notes being transferred to Mr. Gates, that part was all a fiction?

A. He never really held them.

Q. Never had any interest in them?

A. No."

No acknowledgment of trust by either Gates or the Summit Investment Company, admitting the interest of either Wells, McPherson or the Wenatchee Heights Orchard Company was made; nor was any record preserved of any such interest.

The testimony on behalf of claimants is to the further effect that the property, after the transfer to the Summit Investment Company continued in the control of the Wenatchee Heights Orchard Company.

In December, 1912, suit was brought in the Superior Court of King County by certain contract holders of the Wenatchee Heights Orchard Company against it, the Summit Investment Company, Wells, McPherson, Gates and his wife for the appointment of a receiver for the Wenatchee Heights Orchard Company and to have the property transferred to the Summit Investment Company adjudged to belong to the Wenatchee Heights Orchard Company [37] subsequent to the appointment of a receiver for the Wenatchee Heights Orchard Company, it was adjudicated a bankrupt.

In the suit in the Superior Court, an agreement was eventually reached between the plaintiffs, the re-

ceiver and the defendants, Wells and McPherson, which recited that all the property of the Summit Investment Company, was, in effect, the property of the Wenatchee Heights Orchard Company. It provided for new directors for each of these companies. It further provided that the Summit Investment Company should supply the funds required to perform the obligations of the Wenatchee Heights Orchard Company, so far as the same could be supplied from that company's assets. Further provision was made for the transfer of all of the stock of the Summit Investment Company to a Trustee, except sufficient shares to qualify the directors to hold office.

“And the said Wenatchee Heights Orchard Company shall in particular, as soon as may be, proceed to carry out the order of the Public Service Commission of the State of Washington made and entered in cause No. 706 before said Public Service Commission September 28, 1913,
* * * .”

Further provision was made for the dismissal of the suit.

Subsequently, and after the adjudication in bankruptcy, the Summit Investment Company deeded the property back to the Wenatchee Heights Orchard Company. Claimants now contend that the transfer of the property to the Summit Investment Company was merely an effort on their part to obtain a preference, and that, it having been voluntarily abandoned and undone by them, their claims should be unaffected by reason of anything they may have done. The trustee contends that the transfer was a fraud

upon the creditors of the company and for the purpose of hindering and delaying its creditors.

The Referee rules: [38]

“The Referee has not overlooked the claim of the trustee that certain transactions between the bankrupt corporation and the Summit Investment Company, in which the note held by L. V. Wells was used as the apparent consideration for the transfer of the property of the bankrupt corporation to said Summit Investment Company amounted to a payment of the note, but in his opinion the property for which the note is claimed to have been surrendered having been recovered by the trustee of the bankrupt estate he cannot receive the benefit thereof and at the same time have the right to claim that the note has been paid. While it is possible that neither party to these transactions between the bankrupt corporation and the Summit Investment Company would have been entitled to relief as against the other, yet relief having been obtained the consideration, though fraudulent, must be returned.”

If it be true that both the purpose and effect of this transfer was merely to give L. V. Wells and E. H. McPherson preference over the other creditors, as concluded, the ruling is, doubtless, correct.

20 Cyc. 472-b et seq, 572, 624-K 11, 636;

White vs. Cotzhausen, 129 U. S. 329, at 344 and 345;

U. S. Rubber Co. vs. American Oak Lea Co., 181 U. S. 434, at 446 and 447.

Hutchinson vs. Otis, 190 U. S. 552.

The creditors of the bankrupt were, in the main, those with small holdings under the sale contracts, with unliquidated claims against the corporation and its books were in the sole control of the claimants.

According to claimants' own testimony, the property recovered from the Summit Investment Company was transferred without consideration to that company. The new notes given Wells and McPherson were at the time of that transfer, not yet due and might have been transferred to innocent purchasers. As pointed out, no record of the interest of the Wenatchee Heights Orchard Company was preserved and no acknowledgment of trust by either Gates or the Summit Investment Company was given or required. A false record was made by claimants in the minute-book of the [39] Wenatchee Heights Orchard Company to the effect that Gates had purchased claimants' notes against the Wenatchee Heights Orchard Company, and that, for them, he received the company's property. Claimants must be held to have contemplated the probable result of their acts.

On its face, the Summit Investment Company had become the owner of the principal assets of the Wenatchee Heights Orchard Company, freed from any claim by anyone connected with that company. If by any chance this false record, in the control of claimants, was brought to light, still by it, it had been made to appear that Gates was an innocent holder of the notes before maturity, without notice of any equities on the part of the contract holders, and the Summit Investment Company would be in a like advantageous position.

If the true relation between the Wenatchee Heights

Orchard Company, the Summit Investment Company and L. V. Wells and E. H. McPherson was brought to light, under the circumstances, it would, probably, require more than four months' time after the transfer to do so and a preference thereby be established—especially as the creditors, other than claimants, had principally unliquidated claims, and the company defending against their liquidation, would be in the sole control of claimants Wells and McPherson, and, finally, if discovered, and bankruptcy intervened short of four months, the stand might further be taken that, while the preference had not been gained, yet these claims were unsmirched by reason of these transactions.

The discouragement of creditors, naturally resulting from the apparently hopeless condition of the company, would be likely to result in advantage to claimants, both as creditors and as sole stockholders of the corporation. [40]

Claimant Wells, having testified that the Summit Investment Company was organized to facilitate the transaction of the business of the Wenatchee Heights Orchard Company, when repeatedly pressed to state how the transactions with the Summit Investment Company would facilitate the business of the Wenatchee Heights Orchard Company, gave the following explanation:

“A. We proposed to carry out the Wenatchee Heights Orchard Company project to take care of the land and the orchards and to perfect the water system, so that the Wenatchee Heights Orchard Company would be able to fulfill all of its contracts to the purchasers of its land. Early

in that year we had—that would be 1911—we had been sued and a judgment had been recovered against us, which we regarded to be entirely unjust; we thought that no person should have any right to recover a judgment against the Wenatchee Heights Orchard Company on the grounds that those people had, and we were afraid, since they had recovered a judgment, we were afraid that others might possibly follow their course, and it was my idea to conserve the resources of the Wenatchee Heights Orchard Company in such a manner as to prevent the possibility of a repetition of what we had experienced in the matter of this judgment.

Q. In other words—

A. Just a minute, until I get through. That was my idea; we were afraid that possibly there might have been—might be others who would be encouraged by that fact that Mr. Hotchkin had obtained a judgment and would enter suits and thus dissipate the resources of the Wenatchee Heights Orchard Company in a way that we thought was not just. It was our idea to accomplish what we had started out to do, to furnish a water right which would be unquestioned in every particular and to carry out our contracts with our land purchasers perfectly; but if others who had not proper claims against the company were able to recover on judgments, necessarily the assets of the Wenatchee Heights Orchard Company would have been dissipated before we could carry out our contracts; and it was my idea

to surround these resources by such safeguards as would prevent their being dissipated in that manner, and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land.

Q. In other words, you were seeking a method by which you could prevent any person who secured a judgment against your company from levying upon this property and selling it?

A. It was not my idea to prevent any person having a judgment, a just judgment, against the company—

Q. You were to be the judge of whether it was a just judgment or not?

A. Well, now, I am not saying that. [41]

Q. And you were trying to put these assets in such shape so that anybody who secured a judgment for the reasons that Hotchkiss did would be unable to touch that property, isn't that true?

A. No, that was not my idea exactly. My idea was to put the matter in such shape as to discourage persons who thought of entering suits for causes of that kind."

It therefore appears that the scheme was, stripped of its euphony, to hinder and delay creditors.

The Referee did not find such clear and convincing proof of gross over-valuation of the property acquired by the company on its organization as to warrant a finding of fraud, avoiding the indebtedness to the claimants, then assumed by the company.

This conclusion is approved and, as the notes are shown by claimants' testimony, to have been at all

times in their possession; never acquired by Gates and, therefore, never surrendered to the Wenatchee Heights Orchard Company, they will not be treated as paid; but it does not follow that the only disadvantage suffered, on account of the transaction, by Wells and McPherson, is the loss of their now claimed preference.

By their acts, both as creditors and for the corporation, said company's property was transferred in such a way, as found by the Referee, that neither they nor the corporation could recover it. The other creditors, alone, could compel its return to the corporation. They did so. To now hold that the claimants, who were parties to such transfer, may resort to the property they helped put out of the reach of the corporation and themselves, the same as the other creditors, would neither tend to encourage innocent creditors to diligence, nor discourage those dishonestly inclined from scheming for an unfair advantage. [42]

The claims of Wells and McPherson have not been shown to be fraudulent, and will, therefore, be treated as legitimate. But while there is a wide range between one with a purely fabricated claim and one who seeks to secure a preference for a valid claim, yet the holder of a valid claim may lend it and himself to the accomplishment of a fraud, and both be affected thereby.

20 Cyc. 487-c and 638.

Claimants might be diligent in securing the advantage of a preference, without prejudicing their claims. They might even be secret in so doing, if

there was no duty on their part to speak. (U. S. Rubber Co. vs. Am. Oak Lea Co., 181 U. S. 434, at 447, *supra*.) But if the creditor and the corporation do undertake to speak, they are bound to speak truly, and if in these corporation minutes they spoke falsely in a matter naturally tending to their advantage and the deception and disadvantage of other creditors, no element of actual fraud appears lacking, even though the claim evidenced by the notes be not fabricated, but a genuine debt.

It is not necessary to determine the effect of a confessed valuation now of the transferred property not exceeding the creditor's established claims. Such transactions as these should be tested by the situation, action and intention of the parties at the time they acted, and the then probable effect of such action. Though the Court has not found such clearly established fraud in these notes, at the inception of the claim, in the evidence, as to void them, yet they were not free from question, and city property of the nature of that transferred is liable to sudden fluctuations in value. [43]

At the time of the transfers to the Summit Investment Company, it was not unreasonable to calculate that the property had a present value, tested by its potential value, in excess of the established claims. The same rule that saved claimants from condemnation for over-valuation of the property amounting to fraud at the organization of the corporation will obtain in testing their conduct in the matter of the transfer of this property. Their conduct shows that they considered it of greater value than their claims.

Arriving at that not then unreasonable conclusion, the effect of their conduct will be tested as though their conclusion was a verity in establishing actual fraud upon their part.

The fact that, after other creditors brought a suit against Gates, the Summit Investment Company, Wells and McPherson to recover the property transferred, for the Wenatchee Heights Orchard Company, claimants, before judgment consented to return the property, does not purge the transaction of fraud. It cannot be considered a voluntary surrender. These claimants are denied the right to have any of the proceeds of the property recovered applied to the satisfaction of their claims until the claims of other creditors are satisfied.

The conclusion of the Referee that, upon the present evidence, the Trustee should not be directed to comply with the Public Service Commission's order for the increase of the water supply to the present contract holders is affirmed. The penalty imposed by the state law for a failure to comply with the Commission's order cannot be made the basis of a claim in this bankruptcy proceeding. (Section 57-J of the Bankruptcy Act.) If such an order were made, and the expense incurred of increasing the water supply, the claims of the contract [44] holders for damages for a shortage of water would still exist. A different question would be presented if the petition was for authority to compromise the unliquidated claims of the contract holders for such damage by complying with the order and increasing the water supply.

The Referee's order is modified as indicated above.

[Indorsed]: Decision on Review of Referee's Order Denying Trustee's Petition and Allowing Claims of Wells & McPherson in Part. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [45]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

**Order Modifying Order of Referee upon Claim of
L. V. Wells.**

This cause coming on to be heard upon the petitions for review of the claimant L. V. Wells and J. B. Lincoln, as Trustee, and the Court being fully advised and having delivered a written opinion herein, which was filed herein, now, in pursuance of said written opinion, it is

CONSIDERED, ORDERED AND DECREED by the Court that said order of the Referee allowing the said claim of L. V. Wells in the sum of \$56,389.16 be and the same hereby is approved, subject to the following modifications, that is to say, that the said L. V. Wells is denied the right to receive any dividends on his said claim out of the proceeds realized from the assets conveyed by the said Wenatchee

Heights Orchard Company to the Summit Investment Company until all other creditors have been satisfied in full.

Dated this 11th day of December, A. D. 1913.

EDWARD E. CUSHMAN,

Judge.

O. K. as to form only.

T. D. OGDEN.

[Endorsed]: Order Modifying Order of Referee upon Claim of L. V. Wells. Filed in the United States District Court, Western District of Washington. Dec. 11, 1913. Frank L. Crosby, Clerk. Ed. M. Lakin, Deputy. [46]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

Petition for Appeal.

To the Honorable EDWARD E. CUSHMAN, Judge
of Said Court.

Comes now L. V. Wells, a claimant in the above-entitled matter, and feeling himself aggrieved by the order made and entered in this cause on the 11th day of December, 1913, modifying the order of the Referee heretofore made herein upon his claim, does hereby appeal from said order to the Circuit Court of

Appeals for the 9th Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Circuit, sitting at San Francisco, California; and your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

CORWIN S. SHANK,
H. C. BELT,

Attorneys for Claimant L. V. Wells.

The above petition granted and the said appeal allowed upon giving bond as required by law in the sum of \$500.00.

Dated this 11th day of December, 1913.

EDWARD E. CUSHMAN,
Judge. [47]

[Endorsed]: Petition for Appeal. Filed in the United States District Court, Western District of Washington. Dec. 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [48]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5025.

In the Matter of the WENATCHEE HEIGHTS
ORCHARD CO., a Corporation,

Bankrupt.

**Petition on Appeal of J. B. Lincoln, Trustee in Bank-
ruptcy of the Estate of the Wenatchee Heights
Orchard Company.**

Comes now J. B. Lincoln, as Trustee of the Estate of the Wenatchee Heights Orchard Company, bankrupt, and feeling himself, as such Trustee, aggrieved by the judgment made and entered in this cause on the 10th day of December, A. D. 1913, allowing the claim of L. V. Wells and affirming, except as therein stated, the order of the Referee upon said claim, presents and files herewith his Assignments of Error, and does hereby appeal from said order to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and prays that an appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

RAYMOND D. OGDEN,

Attorney for Trustee.

WALTER SCHAFFNER,

Attorney for Trustee.

Dec. 19, 1913.

The foregoing claim of appeal is allowed.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Petition for Appeal, J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[49]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

Assignment of Errors [of L. V. Wells].

And now on this the 11th day of December, A. D. 1913, comes L. V. Wells, the claimant mentioned in the order entered in the above cause, on the 11th day of December, A. D. 1913, modifying the order of the Referee heretofore made in this cause upon his said claim, and says that the said order is erroneous and unjust to the said claimant.

First: Because the said order provides that the said L. V. Wells be denied the right to receive any dividends on his said claim out of the proceeds realized from the assets conveyed by the said Wenatchee Heights Orchard Company to the Summit Investment Company until all other creditors have been satisfied in full.

WHEREFORE the said claimant L. V. Wells prays that the said decree be reversed in so far as it modifies the order of the Referee as hereinabove set out, and that the District Court be instructed to confirm the order of the Referee without any modification as aforesaid.

CORWIN S. SHANK,

H. C. BELT,

Attorneys for Claimant L. V. Wells.

[Endorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington. Dec. 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [50]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of the WENATCHEE HEIGHTS
ORCHARD CO., a Corporation,
Bankrupt.

**Assignments of Error by Trustee in Bankruptcy to
Allowance of Claim of L. V. Wells.**

And now on the 18th day of December, A. D. 1913, comes J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company, bankrupt, by Raymond D. Ogden and Walter Schaffner, his attorneys, and says that the order entered in the above cause on the 10th day of December, A. D. 1913, affirming the order of the Referee,

except as in said order modified, is erroneous and against the just rights of said Trustee in Bankruptcy, for the following reasons:

Because the order made on the 10th day of December, A. D. 1913, allows the claim of L. V. Wells for Fifty-six Thousand Three Hundred and Eighty-nine and 16/100 Dollars (\$56,389.16), the allowance of which said claim is erroneous and unjust, for the following reasons:

(1) That the notes attached to said proof of claim upon which the same was based were executed without any consideration whatsoever.

(2) That the note for Fifty-seven Thousand Dollars (\$57,000), dated the 21st day of September, 1911, attached to said proof of claim and upon which the said claim is in part based, has been fully paid and satisfied.

(3) That nothing whatsoever is due to the said L. V. Wells from said Wenatchee Heights Orchard Company, but that, on the contrary, the said L. V. Wells is indebted to said Wenatchee [51] Heights Orchard Company and was at the time of the filing of the petition herein in the sum of Seventy-five Thousand Dollars (\$75,000) for his subscription to the capital stock of said bankrupt.

(4) That the sum of Forty Thousand Dollars (\$40,000) of said claim was based upon an alleged agreement whereby L. V. Wells sold to the Wenatchee Heights Orchard Company certain real estate, together with 63 shares of the capital stock of the Spring Hill Irrigation Company, and was to receive

in payment therefor 750 shares of the capital stock of said Wenatchee Heights Orchard, and there was to be paid to said Wells the sum of Forty Thousand Dollars (\$40,000) and to certain other parties mentioned in said agreement the sum of Twenty-two Thousand Two Hundred and Forty Dollars (\$22,240); that in truth and in fact the said land sold to said Wenatchee Heights Orchard Company by said L. V. Wells was not worth to exceed the sum of Fifty Thousand Dollars (\$50,000); that at the time such sale was made said L. V. Wells was the president and one of the Trustees of the Wenatchee Heights Orchard Company and the owner of all the capital stock and one E. H. McPherson, the claimant, who, according to said agreement, was to receive the sum of Fifty-eight Hundred Fifty Dollars (\$5,850), was the only other Trustee or officer of said corporation when said agreement was made; said L. V. Wells and E. H. McPherson knew that said land was worth not to exceed the sum of Fifty Thousand Dollars (\$50,000) and said contract was entered into by them on behalf of the Wenatchee Heights Orchard Company and themselves fraudulently, and with the design and purpose of causing it to appear that the said capital stock of the Wenatchee Heights Orchard Company was fully paid, whereas, in truth and in fact, nothing whatever was ever paid thereon.

(5) That the said L. V. Wells is the legal owner and [52] holder of Three Hundred and Seventy-five (375) shares of the capital stock of the *Wenatchee Heights Company* of the par value of Thirty-seven

Thousand Five Hundred Dollars (\$37,500) on which nothing has been paid, and that said Wells is now indebted to the bankrupt in said sum of Thirty-seven Thousand Five Hundred Dollars (\$37,500) for said stock.

(6) That said L. V. Wells is indebted to the bankrupt herein in a large sum of money, the exact amount of which the Trustee is not now able to ascertain, from moneys illegally and improperly withdrawn by him for and on account of said commissions claimed by him.

(7) That the evidence shows that the said L. V. Wells has been guilty of such fraud and unfair dealings and conduct in the management of the affairs of the Wenatchee Heights Orchard Company that he is now debarred and estopped from claiming or attempting to claim any sum or sums whatsoever due him as a creditor of the Wenatchee Heights Orchard Company.

WHEREFORE, said J. B. Lincoln, Trustee of the estate of the Wenatchee Heights Orchard Company, prays that said order, judgment and decree affirming the action of the Referee in the allowance of the claim of L. V. Wells in any capacity whatsoever *by* reversed, and the said Court may be directed to enter a decree reversing the action, ruling and order of the Referee in allowing in any capacity whatsoever the claim of L. V. Wells, and that a decree may be made and entered disallowing *in toto*

the claim of L. V. Wells.

RAYMOND D. OGDEN,

Attorney for Trustee.

WALTER SCHAFFNER,

Attorney for Trustee. [53]

[Endorsed]: Assignment of Errors, J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [54]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Bond on Appeal of L. V. Wells.

KNOW ALL MEN BY THESE PRESENTS,
That we, L. V. Wells, as principal, and American
Surety Company of New York, as surety, acknowl-
edge ourselves to be indebted to J. B. Lincoln, as
Trustee in Bankruptcy of the estate of Wenatchee
Heights Orchard Company, a bankrupt, appellee in
the above cause, in the sum of Five Hundred Dollars
(\$500.00), conditioned that

WHEREAS, on the eleventh day of December,
A. D. 1913, in a proceeding had in the above-entitled
court and cause, wherein the above-named L. V.
Wells was a claimant, a decree was rendered against

the said L. V. Wells and the said L. V. Wells has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said decree;

NOW, if the said L. V. Wells shall prosecute his said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated this eleventh day of December, 1913.

L. V. WELLS.

By H. C. BELT,

His Attorney.

AMERICAN SURETY COMPANY OF
NEW YORK.

By EDWARD J. LYONS,

Resident Vice-President.

[Seal]

S. H. MELROSE,

Resident Assistant Secretary.

Approved December 12, 1913.

EDWARD E. CUSHMAN,

Judge. [55]

[Indorsed]: Bond on Appeal of L. V. Wells. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 12, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[56]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5025.

In the Matter of the WENATCHEE HEIGHTS
ORCHARD CO., a Corporation,
Bankrupt.

Order Allowing Appeal [of J. B. Lincoln, Trustee].

This matter coming on to be heard upon the petition of J. B. Lincoln, Trustee of the estate of the Wenatchee Heights Orchard Company, bankrupt, for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, from an order entered on the 10th day of December, A. D. 1913, affirming the order of the Referee except as therein modified, and it appearing that said petition is in proper form and filed within the time required by statute, and that said petitioner has duly filed with said petition his Assignments of Error,—

It is hereby ORDERED that the said appeal be and the same hereby is allowed.

Entered in open court this 19th day of December, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Order Allowing Appeal, J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20,

1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [57]

*In the United States Circuit Court of Appeals in
and for the Ninth Judicial Circuit.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Citation [on Appeal of S. V. Wells].

United States of America, to J. B. Lincoln, as Trustee in Bankruptcy of the Estate of Wenatchee Heights Orchard Company, Greeting:

You are hereby notified that in a certain proceeding had in the above-entitled cause in bankruptcy in the United States District Court in and for the Western District of Washington, Northern Division, wherein L. V. Wells is claimant, an appeal has been allowed to the said L. V. Wells to the United States Circuit Court of Appeals for the Ninth Circuit, and you are therefore hereby cited and admonished to be and appear in said court, at San Francisco, on or before the 31st day of December, 1913, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court, this 12th day of December, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,
Judge.

We hereby admit service of the within paper this 12th day of December, 1913.

RAYMOND D. OGDEN,
WALTER SCHAFFNER,
Attorneys for Trustee. [58]

[Indorsed]: No. 5025. United States District Court for the Western District of Washington, Northern Division. In the Matter of Wenatchee Heights Orchard Company, a Corporation, Bankrupt. Citation to J. B. Lincoln on Appeal. Filed in the United States District Court, Western District of Washington, Dec. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Corwin S. Shank, H. C. Belt, Attorneys for L. V. Wells, Alaska Building, Seattle. [59]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD CO., a Corporation,
Bankrupt.

Citation [on Appeal of J. B. Lincoln, as Trustee].
To L. V. Wells, Claimant:

You are hereby notified that in a certain proceedings had in the above-entitled cause in bankruptcy, in the United States District Court for the Western District of Washington, Northern Division, wherein J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company,

is resisting the allowance of the claim of L. V. Wells, as claimant, an appeal has been allowed to the said J. B. Lincoln, Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company in the United States Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, said district, within thirty (30) days from and after the date hereof pursuant to a petition on appeal, Assignment of Error, filed with the clerk's office in the District Court of the United States for the Western District of Washington, Northern Division, in the matter of the Wenatchee Heights Orchard Co., bankrupt, to show cause, if any there be, why the judgment rendered in said cause affirming, except as herein modified, the Findings of the Referee in Bankruptcy, allowing the claim [60] of L. V. Wells, as claimant for the sum of \$56,389.16, should not be reversed as in said petition of appeal set forth, and why said order and decree appealed from should not be corrected, as in said Petition of Appeal and Assignments of Error set forth, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court, on the 19th day of December, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Copy of the within Citation received and due ser-

vice of same acknowledged this 20th day of Dec., 1913.

CORWIN S. SHANK and
H. C. BELT,

Attorneys for Wells.

[Endorsed]: No. 5025. Citation J. B. Lincoln, Trustee. In the U. S. District Court Western District of Washington, Northern Division. In the Matter of the Estate of Wenatchee Heights Orchard Company, Bankrupts, vs. J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Walter Schaffner, Raymond D. Ogden, Postoffice and Office Address. Offices: 507 Lowman Bldg., Seattle, Washington, Attorneys for Trustee. [61]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Praeipie for Record on Appeal of L. V. Wells.

To Frank L. Crosby, Clerk of Said Court:

Kindly incorporate into the transcript of the record upon the appeal of L. V. Wells from the order entered in said court and cause upon December 11, 1913, upon his claim, the following portions of the record:

- (1) Order of adjudication of bankruptcy.
- (2) Order of reference.
- (3) Claim of L. V. Wells.
- (4) Objections of Trustee to claim of L. V. Wells.
- (5) Order of Referee upon claim of L. V. Wells.
- (6) Petition of Trustee for revision of Referee's order upon claim of L. V. Wells.
- (7) Petition of L. V. Wells for revision of Referee's order upon his claim.
- (8) Opinion of Judge Cushman upon claim of L. V. Wells (filed December 3, 1913).
- (9) Order of Judge upon claim of L. V. Wells.
- (10) Petition of L. V. Wells on appeal.
- (11) Assignments of Error by L. V. Wells.
- (12) Bond of L. V. Wells on appeal.
- (13) Citation on appeal of L. V. Wells.
- (14) Statement of evidence upon claim of L. V. Wells.

Dated this 12th day of December, 1913.

CORWIN S. SHANK,
H. C. BELT,

Attorneys for Claimant Wells. [62]

Service of the within paper is hereby admitted this 12th day of December, 1913.

WALTER SCHAFFNER and
R. D. OGDEN,

Attorneys for Trustee.

[Endorsed]: Praeipie for Record on Appeal of L. V. Wells. Filed in the United States District Court, Western District of Washington. Dec. 12, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[63]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

**Praecipe for Record on Appeal of J. B. Lincoln,
Trustee.**

To Frank L. Crosby, Clerk of said Court:

Kindly incorporate into the transcript of the record upon the appeal of J. B. Lincoln, Trustee of the Wenatchee Heights Orchard Company, Bankrupt, from an order entered in said cause upon December 10th, 1913, sustaining the order of the Referee, except as therein modified, in the allowance of the claim of L. V. Wells:

- (1) Petition in bankruptcy.
- (2) Form of real estate contract of Wenatchee Heights Orchard Company.
- (3) Order of adjudication of bankruptcy.
- (4) Order of reference.
- (5) Claim of L. V. Wells.
- (6) Objections of the Trustee to claim of L. V. Wells.
- (7) Order of Referee upon claim of L. V. Wells.
- (8) Petition of Trustee for revision of Referee's order upon claim of L. V. Wells.
- (9) Petition of L. V. Wells for revision of Referee's Order upon his claim.

- (10) Opinion of Judge Cushman upon the claim of L. V. Wells filed December 3, 1913.
- (11) Order of the Judge upon claim of L. V. Wells.
- (12) Petition of J. B. Lincoln, Trustee, on appeal.
- (13) Assignments of error by J. B. Lincoln, Trustee. [64]
- (14) Order granting appeal.
- (15) Citation on appeal of J. B. Lincoln, Trustee.
- (16) Statement of evidence of J. B. Lincoln, Trustee.

RAYMOND D. OGDEN,
WALTER SCHAFFNER,

Attorneys for J. B. Lincoln, Trustee.

Copy of the within praecipe received and due service of same acknowledged this 19th day of Dec. 1913.

CORWIN S. SHANK. and
H. C. BELT,

Attorneys for Wells.

[Endorsed]: Praecipe for record on appeal of J. B. Lincoln, Trustee. Filed in the United States District Court, Western District of Washington. Dec. 19, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [65]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5025.

In the Matter of the WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 94 typewritten pages, numbered from 1 to 94, inclusive, to be a full, true, correct and complete copy of so much of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipes of the attorneys for the Claimant and Trustee, as the same remain of record and on file in the office of the clerk of the said court, and that the same constitute the transcript of record on appeal from the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellants for preparation and certification of the typewritten transcript of record issued

to the United States Circuit Court of Appeals [66]
for the Ninth Circuit in the above-entitled cause, to
wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for mak- ing transcript of the record for printing purposes 223 folios at 30c per folio.....	\$66.90
Certificate to certified copy of typewritten transcript of record.....	.30
Seal to said certificate.....	.40
	<hr/>
	\$67.60

I hereby certify that the above cost for preparing
and certifying record amounting to \$67.60 has been
paid to me by Messrs. Corwin S. Shank and H. C.
Belt, attorneys for L. V. Wells, Raymond D. Ogden,
and Walter Schaffner, attorneys for Trustee.

IN WITNESS WHEREOF I have hereto set my
hand and affixed the seal of said District Court at
Seattle, in said District, this 24th day of December,
A. D. 1913.

[Seal]

FRANK L. CROSBY,
Clerk. [67]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

IN BANKRUPTCY—No. 5025.

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY,

Bankrupt.

Statement of Evidence upon Claim of L. V. Wells.

BE IT REMEMBERED that on the 3d day of September, 1913, the objections of J. B. Lincoln, as Trustee of Wenatchee Heights Orchard Company, the above-named bankrupt, to the claim of L. V. Wells came regularly on for hearing before Hon. John P. Hoyt, Referee in Bankruptcy, the said claimant being present in person and being represented by H. C. Belt, his attorney, and the Trustee being present in person and being represented by Raymond D. Ogden and Walter Schaffner, his attorneys, whereupon the following proceedings were had:

It was stipulated that all testimony of L. V. Wells and E. H. McPherson taken in this cause since the adjudication in bankruptcy should be considered upon this hearing, subject to any objections on the ground of materiality or relevancy.

[Testimony of E. H. McPherson.]

The testimony of E. H. McPHERSON which was thus offered was taken upon June 11, 1913, upon his examination as an officer of the bankrupt, and was to the effect, among other things, that he was at all times since the organization of the bankrupt the secretary and a trustee of said bankrupt; that at the time of the organization of the bankrupt he was interested in certain portions of the property afterwards conveyed to the bankrupt known as the Walker property consisting of 160 acres, [68*—1†]

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Statement of Evidence as same appears in Certified Transcript of Record

(Testimony of E. H. McPherson.)

and the Wheeler property consisting of about 320 acres; that this was all included in the plats except about 10 acres of waste land in the Walker tract and about two-thirds of the Wheeler tract; that this interest was the result of other deals had between Mr. Wells and himself; that his interest in this property was about one-fourth or one-third; that they had paid \$12,000 or \$15,000 for the Walker tract, and \$30,000 for the Wheeler tract; that he had no interest in the rest of the property; that A. C. McPherson was his brother and that he owned another piece of property which they had bought from him paying therefor \$7,500; this tract contained 80 acres, of which 20 or 30 acres was good land; that W. G. Steward was interested in the Walker and Wheeler tracts; that the \$5,850 which the minutes provided he was to receive did not represent all of the amount that he had in the property; that he had put in as close as he could figure about \$15,000. Thereupon he testified as follows:

“Q. And your proportion was one-fourth or one-third?

A. Yes, something like that; we had figured that out and it was the result of several different deals. We had been in several different deals and sold out and made a profit, and later it was necessary to put in some more money to keep it going and set out the orchard; we had set out one hundred acres of orchard, so it was rather a complicated amount.

Q. Was there any record kept of these transac-

(Testimony of E. H. McPherson.)

tions? A. There was at the time; yes.

Q. Do you know what has happened to them?

A. At the time we organized the company we cleaned up the entire transaction and divided it up in the way of stock in the company. In other words, we assumed the property to be worth a certain amount.

Q. How much did you estimate all the property to be worth?

A. We estimated the property to be worth two hundred thousand.

Q. Two hundred thousand? A. Yes.

Q. That was encumbered for fifty thousand?

A. Yes." [69—2]

The witness further testified that the interest of Mr. Steward in the Walker and Wheeler tracts was about the same as his own, but later stated—

“A. (Interrupting.) I am mistaken about that; his interest would not be as big as mine.

Q. What interest did he have?

A. About half as large.

* * * * *

Q. For that property you got a credit of \$5,850 and 37,500 in par value of stock?

A. Well, I think there was something else for that. I had some other deal with Mr. Wells which was turned in mine.

Q. The company got nothing else? A. No.

* * * * *

Q. How did you arrive at that \$5,850?

A. I couldn't exactly tell you now. It was, as I

(Testimony of E. H. McPherson.)

say, a very complicated arrangement, the result of several deals we had been interested in for two or three years, and I could not recall now just what it was. I wouldn't attempt to describe it.

* * * * *

Q. Had any declaration of trust been issued or signed by Mr. Wells on this property showing that he had it in trust for you and Mr. Stewart?

A. I think we had an agreement signed between us is all.

Q. Do you know where that agreement is?

A. No, I am not sure.

Q. You had a copy of it?

A. Yes. I may have it yet.

Q. Did Mr. Wells ever make any accounting to you in writing of the various transactions surrounding this property?

A. Why, I expect he did at the time.

Q. Have you that now?

A. I don't recall whether I have it or not.

Q. How was this forty thousand dollars arrived at which Mr. Wells was to receive in cash?

A. Well, he had a larger interest in the property than I did. That was figured out to take care of what he had, because there was one tract he owned himself, separate from this. [70—3]

Q. How big was that tract, do you know?

A. It would be the east half, I think, of section 26, and there is some old orchard on it; and part of the west half of section 26; about 160 or a couple hundred acres. Yes, there was more than that, because

(Testimony of E. H. McPherson.)

part of it was waste land. There were several hundred acres, including the waste land. I couldn't say how much.

Q. You didn't attend to any of the buying of any of this property, did you?

A. No, I don't think so. Mr. Wells did that.

Q. Mr. Wells was running that himself?

A. Yes.

Q. How much did you put into this pool or combination, or whatever we may call it, in the beginning?

A. Oh, the beginning was way back three or four years before that, and at that time values were cheap and it didn't take much to get in. We went across the river and took options on three or four hundred acres, intending to irrigate it, and afterwards sold it out to the Wenatchee Canal Company without putting in so very much, so the amount we put in would only be several hundred dollars at that time, because values were advancing rapidly, things were jumping. You could get in on a shoestring, as they say, at that time, and perhaps make a big profit in a few months.

Q. Did you put in any more after that?

A. I think I did, at various times."

The witness further testified that most of the purchasing and most of the expenditure of the money had been done by Mr. Wells, but according to the best estimate of the witness there had been expended upon the property for purchase and improvement about \$115,000.

The witness further testified that the property

(Testimony of E. H. McPherson.)

which was conveyed to the Summit Investment Company by the bankrupt was conveyed merely for the purpose of vesting the title to the said property in the Summit Investment Company; that B. E. Gates never had possession of the notes mentioned in the communication from him to the Wenatchee Heights Orchard Company, and that the said notes were never canceled.

The witness further testified upon cross-examination that the irrigated real estate market in Wenatchee in 1905 and 1906 was booming; that people were doubling their money [71—4] in a year or two; that he and Mr. Wells when they turned this property into the company estimated the irrigable lands with the water right which they had to be worth \$250 an acre; that in the Wenatchee Valley proper raw land under ditch was at the time selling from \$400 to \$600 an acre.

[Testimony of L. V. Wells.]

The testimony of L. V. WELLS which was thus offered was taken upon June 23, 1913, and June 24, 1913, upon his examination as an officer of the bankrupt, and it is to the effect, among other things, that he was at all times since the organization of the bankrupt the president and a trustee of said bankrupt; that the first interest which he acquired in the land subsequently deeded to the Wenatchee Heights Orchard Company was the west half of section 25 and the northeast quarter of section 26, and the north half of the southwest quarter of section 34—22—20,

(Testimony of L. V. Wells.)

together with 13 shares of water stock, which was acquired in 1903 from Gunn and Brown in exchange for other property at a valuation of \$25,000; that he next acquired the southeast quarter of section 26 together with 10 shares of water stock from Percy Walker, paying therefor \$12,000 in cash; that with Mr. A. C. McPherson, in 1905, he purchased the northeast quarter of section 34 from Mr. Cole together with 5 shares of water stock; that next they purchased the Wheeler property of 320 acres in 1905 together with 20 shares of water stock for \$15,000; that of all of this property there was about 600 acres subsequently platted as the Wenatchee Heights Orchard tracts, which was practically all tillable land and the rest was hillside of the value of about \$15 per acre being useful for pasturage and grazing; that at the time this property was platted in 1907 there were about 30 acres [72—5] of bearing orchard, and five sets of cheap farm buildings, together with ten acres which were just coming into bearing; that subsequent to the purchase of the property and prior to the incorporation of the bankrupt, they had set out forty more acres of land, which at the time was four years old, at an expense in the neighborhood of \$4,000, had built two new houses at a cost of \$1,000; had also set out ten acres of orchard, which was then two years old, at an expense of \$750; and that they had done considerable other work—breaking, fencing, improving old orchard, and purchasing farm implements. Thereupon he testified as follows:

“Q. (By Mr. OGDEN.) Now, Mr. Wells, at the

(Testimony of L. V. Wells.)

time of your incorporation you incorporated for how many shares? What's the capital stock?

A. What incorporation is this?

Q. The Wenatchee Heights Orchard Company?

A. Seventy-five hundred.

Q. A total of seventy-five hundred shares?

A. Yes.

Q. For that you turned over to this incorporation this property with a total expenditure of this \$68,150? A. Yes.

Q. Upon the property at that time there was a mortgage of fifty thousand dollars, was there not?

A. Yes.

Q. That left \$18,150. Of that \$18,150, Mr. Wells, the property which we have heretofore designated as the northeast quarter of 34, had never been paid for, had it? A. At the time it was turned over?

* * * * *

Q. Then, Mr. Wells, from the \$68,150 you should subtract \$7,500 as a part of the money originally expended in the purchase of this property, should you not?

A. I don't know whether we should or not. It depends on what you are getting at.

Q. You have never paid for that, have you?

A. You asked me whether you should subtract that. [73—6]

Q. I am trying to ascertain the exact amount of money in that property, expended by you prior to incorporation.

A. I am giving it to you as near as I can.

(Testimony of L. V. Wells.)

Q. Well, if the company gave their note and paid for it, you didn't pay for it, did you?

A. If the company bought something and paid for it, certainly then I didn't buy it and pay for it.

Q. Very well, then, Mr. Wells, we will subtract this amount from \$18,150, the balance of your equity in this property after the mortgage upon it is taken off, and you have \$14,650 equity in that property, which was the actual amount of money in the corporation at the time you turned it over to the company.

Mr. BELT.—I think it is rather unfair to the witness, asking his opinion as to questions of law.

The COURT.—The question is only one as to the fact; it is not a question of law; he is asking if that is the fact; the witness has testified to the amount expended and now he is asking the witness how much it would leave; it is a question of subtracting and the witness can subtract as well as anybody.

Q. For this \$14,650, Mr. Wells, you received, you and Mr. McPherson received from the Wenatchee Heights Orchard Company seventy-five thousand dollars worth of capital stock?

A. Do you want me to say yes?

Q. It is up to you.

A. Well, I won't say yes to that question because that property had been purchased, a part of it, a considerable time prior to the date of the incorporation of the company, and land values had been increasing—

Q. Now, Mr. Wells—

(Testimony of L. V. Wells.)

Mr. BELT.—Just a second. I object to counsel interrupting the witness.

Q. I am not asking you what the property increased in value at all. I am getting at the actual money invested; we will get at the other later on.

A. You want to know how much money we made by making the transfer?

Q. You answer my question. You did receive seventy-five thousand dollars for it, did you not?
[74—7]

The witness further testified that the property was turned into the bankrupt in payment of the \$75,000 of capital stock, a note for \$40,000 to himself, a note to E. H. McPherson for \$5,850, a note to A. C. McPherson for \$7,500, and a note to Mr. Steward for \$8,890; that they thereupon proceeded to sell the land except what had already been set out to orchard for \$500 an acre; that the bearing orchard of about 30 acres was sold for about \$20,000, so that the total amount received from the property was \$340,000; that a large portion of this land was sold upon long time contracts, the bankrupt agreeing to plant and care for an orchard upon the land until the contracts matured; that subsequently they traded certain of these contracts upon which there was \$65,000 unpaid to a Mrs. Stevens for Seattle property, and Mr. Beninghausen and Mr. McElwain are now the successors in interest of Mrs. Stevens; they also traded \$15,916 of these contracts to Mr. Ryer for other Seattle property, and \$9,000 more to a Mr. Douglas for other Seattle property.

(Testimony of L. V. Wells.)

The witness further testified that A. C. McPherson received about \$2,000 in cash and a note for \$7,500 as payment in full for his investment; that his investment consisted of a half interest in the Cole 40 acres and a half interest in 80 acres in section 34; that Steward got about \$2,000 in cash and a note for \$8,890 for his interest; that his interest was scattered around through several pieces of property; that when they organized the company they estimated the value of the property to be \$200,000; that he did not recall the values placed upon the various tracts; it was his recollection that Mr. Steward's interest was larger than that of Mr. E. H. McPherson, but that Mr. E. H. McPherson received his interest in the corporation and his note as "a result of [75—8] some other deals Mr. McPherson and I had personally." Thereupon he testified as follows:

"Q. At the time the settlement was arrived at you had an accounting between you, didn't you, all of you? A. An accounting?"

Q. Yes. A. Yes, sir.

Q. And that was put in writing, the figures?

A. Well, yes, we made figures.

Q. Where are they?

A. Well, I don't know. The figures that we made we made on pieces of paper and I don't know whether I could find those now or not; whether they were ever kept.

Q. You don't think they were kept?

A. I don't know whether they were kept."

The witness further testified that about the time

(Testimony of L. V. Wells.)

of the organization of the bankrupt this property had been valued by R. F. Holm, who was then in the real estate business at Wenatchee, by George A. Virtue of Seattle, Arthur Ward of Seattle, Mr. W. C. Steward, who is now at Boise, Idaho, A. C. McPherson and E. H. McPherson.

The witness further testified that the note for \$57,000 mentioned in the proposal of B. E. Gates was the same note which is attached to his proof of claim herein, but the said note had never been in the possession of B. E. Gates and had never been cancelled; that the property which was conveyed by the Wentachee Heights Orchard Company to the Summit Investment Company was conveyed merely for the purpose of vesting the title to the said property in the Summit Investment Company.

The witness further testified that on June 1, 1907, he loaned the bankrupt \$4,000; that on April 10, 1908, he loaned the bankrupt \$3,000; on April 26, 1908, he loaned the bankrupt \$2,200; that on each of these occasions he took [76—9] the bankrupt's note therefor; that the proceeds of the said loans were used in the bankrupt's business, and have never been repaid and were included in his present claim; that on August 12, 1912, he borrowed from the First National Bank the sum of \$1,000; on October 11, 1912, he borrowed from the First National Bank the sum of \$700; on December 1, 1912, he borrowed from the First National Bank the sum of \$250, all of which sums he loaned to the bankrupt and are included in his claim; that on December 12, 1911, he loaned the

(Testimony of L. V. Wells.)

bankrupt the sum of \$1,150; that the \$50,000 loan which had been placed upon the property was placed upon it by a loan company represented by Mr. Dameyer, who had inspected the property at previous times; that he was familiar with Mr. Dameyer's methods and knew at the time he made this loan his maximum limit of loaning was 331½% of his appraised value of the property; that during the summer of 1907 the price of first-class raw lands under ditch around Wenatchee ranged from \$300 an acre to \$500 or \$600 an acre, and that the estimated cost of bringing an orchard into bearing from the raw land was \$100 an acre.

Thereupon the minutes of a special meeting of the stockholders and board of trustees of the Wenatchee Heights Orchard Company held upon October 10, 1911, were introduced in evidence. These minutes were as follows:

**[Minutes of Special Meeting of Stockholders, etc., of
Wenatchee Heights Orchard Co., October 10,
1911.]**

Wenatchee, Wash., Oct. 10, 1911.

A special meeting of the stockholders of the Wenatchee Heights Orchard Company was held at the office of the company in accordance with a notice duly issued. There were present L. V. Wells owning 375 shares, and E. H. McPherson owning 375 shares of the capital stock of the company.

The following proposal was received from B. E. Gates of Seattle, Wash.

“Having purchased the following promissory notes

[77—10] made by your company, viz.: One dated Sept. 21 to L. V. Wells for \$57,000, due ninety days from date, and one dated Sept. 21 to E. H. McPherson for \$18,000, due ninety days from date, and being desirous of collecting the same I propose to take the following described property in full satisfaction of the said notes and accumulated interest:

“All of Block 1, C. D. Hillman’s Pacific City Division Number 2, value \$5,000.

“Lot 14 and the North $\frac{1}{2}$ of Lot 15, Block 17, East Park Addition to the City of Seattle, value \$12,000.

“The South 58 feet of Lot 4, Block 122 A. A. Denny’s Broadway Addition to the City of Seattle, value \$38,000.

“The S. W. $\frac{1}{4}$ of Sec. 26, T. 22 N. of R. 20 E., W. M., value \$14,000.

“All of Section 25, T. 22 N. of R. 20 E., W. M., excepting the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Section and excepting all that portion of said Section included in the Wenatchee Heights Orchard Tracts and the First Addition to the Wenatchee Heights Orchard Tracts according to the recorded plat thereof. Also all of the W. $\frac{1}{2}$ of Sec. 25, and all of the E. $\frac{1}{2}$ of Sec. 26, T. 22, N. of R. 20 E., W. M., excepting that portion of the said section included in the Wenatchee Heights Orchard Tracts according to the recorded plat thereof. Value \$6,000.

“I agree to assume the mortgage against the above property, amounting to \$33,500.”

After a careful consideration of the proposal, on motion duly made by a stockholder, seconded and unanimously carried, all stock voting in favor, it was

decided to accept the said proposal. There being no further business the meeting adjourned.

L. V. WELLS.

E. H. McPHERSON.

Seattle, Wash., Oct. 10, 1911.

A special meeting of the board of trustees of the Wenatchee Heights Orchard Company was held at the office of the Company in accordance with a notice duly served. The following trustees were present being, all the trustees of the company, L. V. Wells and E. H. McPherson.

The following resolution was introduced, and upon motion duly made and seconded, was unanimously adopted:

“Whereas, the proposal of B. E. Gates to accept certain property of the company in payment of notes given by the company to L. V. Wells and E. H. McPherson, and held by him, having been accepted by the stockholders, therefore, Resolved, that the President and Secretary be and are hereby authorized to complete the transfer in accordance with said proposal.

There being no further business the meeting adjourned.

E. H. McPHERSON,

Secretary.

L. V. WELLS,

President.” [78—11]

Thereupon the minutes of a special meeting of the board of trustees of the Wenatchee Heights Orchard Company held upon December 7, 1911, were intro-

duced in evidence. The said minutes were as follows:

**[Minutes of Special Meeting of Board of Trustees of
Wenatchee Heights Orchard Co., etc., December
7, 1911.]**

Wenatchee, Wash., Dec. 7, 1911.

A special meeting of the board of trustees of the Wenatchee Heights Orchard Company was held at the office of the company, there being present L. V. Wells and E. H. McPherson, being all of the Trustees of the Company.

Upon motion duly made by a trustee, and seconded, the following resolution was unanimously adopted:

“Whereas, the trustees and stockholders of the company have heretofore accepted a proposition made by B. E. Gates to exchange certain property for notes given by the company to L. V. Wells and E. H. McPherson, and

“Whereas, a request has been received from the said B. E. Gates, that the said property be deeded to the Summit Investment Company,

“Resolved, that the President and Secretary be and are hereby authorized to execute the necessary deeds as referred to in a resolution adopted by the trustees on Oct. 10, 1911, to the Summit Investment Company, instead of to B. E. Gates.”

There being no further business the meeting adjourned.

E. H. McPHERSON,
Secretary.

L. V. WELLS,
President.”

It was thereupon stipulated that the testimony of B. E. Gates taken prior to the adjudication of bankruptcy should be considered at this hearing in so far as it was material.

[Testimony of B. E. Gates.]

The testimony of B. E. GATES which was thus considered was taken upon February 11, 1913, and it was to the effect, among other things, that he had been president and trustee of the Summit Investment Company; that all of the property owned by the Summit Investment Company had come from the bankrupt; that he had received certificates of stock in the said company from L. V. Wells. Thereupon he testified as follows:

“Q. Did you pay anything for those certificates?

A. In cash, no, sir. [79—12]

Q. Did you give anything for them?

A. There was a transaction worked out by counsel, but the details of that I can't give you because I never had the records.

Q. Did you part with any property?

A. No, sir. There were some notes which had been assigned to me which were cancelled.

Q. Notes of whom?

A. Those were the notes of the Wenatchee Heights Orchard Company, I think.

Q. And in return for this stock you then cancelled the notes? A. Yes, sir.

Q. How much did those notes amount to?

A. I don't remember.

Q. Approximately? A. I couldn't give it.

Q. Can't you give us some idea?

(Testimony of B. E. Gates.)

A. No, I cannot.

Q. Was it as much as five thousand?

A. Oh, more than that, I should imagine.

Q. Can you give us within five thousand of how much that amounted to? A. I couldn't.

Q. Was it as much as fifty thousand?

A. I should imagine about that.

Q. Somewhere in the neighborhood of fifty thousand? A. I think so.

Q. To whom were those notes issued originally; to you? A. No.

Q. To whom?

A. I think those notes were originally issued to L. V. Wells.

Q. And you got them from Wells? A. Yes.

Q. What did you pay Wells for those notes?

A. Well, they were turned over to me for services rendered.

Q. In connection with what?

A. Handling the project.

Q. What services did you render in that connection?

A. Well, I have been selling properties. I made several deals for them which enabled them to get the money to pay off their indebtedness.

* * * * * * * *

[80—13]

Q. In payment for what services you had rendered were those notes received by you from Mr. Wells?

A. Well, to go into that transaction I think I am the wrong witness.

(Testimony of B. E. Gates.)

Q. Well, just go ahead, and state.

A. Because I can't tell you.

Q. You don't know what you received?

A. The whole transaction was worked up by counsel and he kept all the records.

Q. By whom? A. By counsel.

Q. Who? A. George Bailey.

Q. Representing whom?

A. Summit Investment Company.

Q. What was your understanding or your reason for getting this fifty thousand dollars of notes, or approximately that amount—what did you understand you were getting those for?

A. Well, I suppose for general good will more than anything else."

The witness further testified that all of the stock was held in his name but one share which was held by his wife; that he and his wife were the trustees of the Summit Investment Company; that he was president and she was secretary and treasurer, and there were no other officers or trustees; that he had executed no declaration of trust with relation to the shares of stock, or to the property of the company; that at the time of the execution of the agreement between McElwain, Ryer and Beninghausen on the one side, and L. V. Wells and McPherson on the other, he indorsed the stock in blank and turned it over to Mr. McClure, and that he had never seen the stock since; that he had always accounted for the rentals from the property and turned them over to the Wenatchee Heights Orchard Company as the property of said company.

**[Deposition of L. V. Wells, Taken Prior to
Adjudication in Bankruptcy.]**

Thereupon it was stipulated that the deposition of L. V. WELLS, taken prior to the adjudication in bankruptcy should be [81—14] considered at this hearing in so far as it was material. The deposition of L. V. Wells which was thus offered was taken on February 23, 1913, and was to the effect, among other things, as follows:

That the Wenatchee Heights Orchard Company was organized in December, 1906; that he had been the president from its organization, and shortly after its organization had transferred to the company certain property in payment for all of its capital stock; that of this property he had acquired 480 acres, together with 15 shares of water stock in 1903, paying therefor \$25,000; that he then paid \$12,000 for a quarter section, together with 10 shares of water stock, and about \$28,000 for the remainder; at the time he purchased this there was one mortgage of about \$7,000, which was not included in the figures previously given, so that the total original cost of the land was about \$72,000; that he put a mortgage of \$50,000 on the property, of which amount some went to pay portions of the purchase price and the remainder went on the improvement of the property; that he turned this property in to the company subject to the \$50,000 mortgage in payment of the capital stock, and subject to the following indebtedness: \$40,000 to himself; \$5,850 to E. H. McPherson; \$8,890 to W. G. Steward; \$7,500 to A. C. McPherson; of the 1200

(Deposition of L. V. Wells.)

acres which he turned over about 830 were tillable; that the Summit Investment Company was organized for the purpose of having conveyed to it the property of the Wenatchee Heights Orchard Company; that Mr. Gates had no real interest in the Summit Investment Company.

The witness further testified as follows:

“A. We proposed to carry out the Wenatchee Heights Orchard Company project to take care of the land and the orchards and to perfect the water system, so that the Wenatchee Heights Orchard Company would be able to fulfill all of its contracts [82—15] to the purchasers of its land. Early in that year we had—that would be 1911—we had been sued and a judgment had been recovered against us, which we regarded to be entirely unjust; we thought that no person should have any right to recover a judgment against the Wenatchee Heights Orchard Company on the grounds that these people had, and we were afraid, since they had recovered a judgment, we were afraid that others might possibly follow their course, and it was my idea to conserve the resources of the Wenatchee Heights Orchard Company in such a manner as to prevent the possibility of a repetition of what we had experienced in the matter of this judgment.

Q. In other words—

A. Just a minute, until I get through. That was my idea; we were afraid that possibly there might have been—might be others who would be encouraged by that fact that Mr. Hotchkin had obtained a judg-

(Deposition of L. V. Wells.)

ment and would enter suits and thus dissipate the resources of the Wenatchee Heights Orchard Company in a way that we thought was not just. It was our idea to accomplish what we had started out to do, to furnish a water right which would be unquestioned in every particular and to carry out our contracts with our land purchasers perfectly; but if others who had not proper claims against the company were able to recover on judgments, necessarily the assets of the Wenatchee Heights Orchard Company would have been dissipated before we could carry out our contracts; and it was my idea to surround these resources by such safeguards as would prevent their being dissipated in that manner, and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land.

Q. In other words, you were seeking a method by which you could prevent any person who secured a judgment against your company from levying upon this property and selling it?

A. It was not my idea to prevent any person having a judgment, a just judgment, against the company—

Q. You were to be the judge of whether it was a just judgment or not?

A. Well, now, I am not saying that.

Q. And you were trying to put those assets in such shape so that anybody who secured a judgment for the reasons that Hotchkin did would be unable to touch that property? Isn't that true?

(Deposition of L. V. Wells.)

A. No, that was not my idea exactly. My idea was to put the matter in such shape as to discourage persons who thought of entering suits for causes of that kind."

The witness further testified that the notes mentioned in the minutes of the meetings of October 10, 1911, never had been in the possession of Mr. B. E. Gates, and were not canceled as a result of the said transaction. That conveyances were [83—16] made to the Summit Investment Company of the property mentioned in the said minutes pursuant to the resolutions therein set forth, but that all the rentals arising from the said property continued to be paid into the treasury of the Wenatchee Heights Orchard Company.

That on December 24, 1912, a suit was instituted in the Superior Court of King County, Washington, against the Wenatchee Heights Orchard Company, Summit Investment Company, Wells, McPherson and Gates, and their respective wives, for the purpose of obtaining the appointment of a receiver and setting aside the transfers made to the Summit Investment Company. That G. Beninghausen was appointed a temporary receiver in said action. That he had no intimation of such a suit being brought before it was brought. That immediately upon learning of the bringing of said suit he went to Seattle and conferred with the people who had brought the suit, to wit, Mr. Ryer and Mr. Elwain and Mr. Beninghausen, the receiver, and that they thereupon entered into an agreement under which the stock of the Summit Invest-

(Deposition of L. V. Wells.)

ment Company was turned over to Mr. Benninghausen, and it was agreed that all of the assets of the Summit Investment Company were at all times the assets of the Wenatchee Heights Orchard Company, and were to be applied in carrying out the corporate purposes of the said company.

Thereupon the contract of December 30, 1912, between William P. McElwain, F. E. Ryer and G. Benninghausen, parties of the first part, and L. V. Wells and E. H. McPherson, parties of the second part, was admitted in evidence. The portions of the said contract which are material hereto are as follows:

**[Excerpts from Contract of December 30, 1912,
Between McElwain et al. and Wells et al.]**

WHEREAS, The Summit Investment Company is a corporation organized under the laws of the State of Washington, with a capital stock of Seventy-five Thousand Dollars, the sole stockholders and sole trustees of said corporation being B. E. Gates and Nellie B. Gates, his wife, the said Gates and wife having no interest in said capital stock or the property of said [84—17] Summit Investment Company; and

WHEREAS, All of the property, assets and effects of the said Summit Investment Company are in fact the property, assets and effects of the Wenatchee Heights Orchard Company, the said Summit Investment Company holding same as trustee for said Wenatchee Heights Orchard Company; and,

WHEREAS, The parties of the first part are the owners and holders of certain land and water contracts issued by the said Wenatchee Heights Orchard

Company, and are also the owners of certain sums due and to grow due from certain persons who have purchased land and water contracts from the said Wenatchee Heights Orchard Company, the aggregate of the interests of the parties of the first part being a very large sum; and,

WHEREAS, It has been agreed by and between the parties hereto that the board of trustees of the Summit Investment Company shall be increased, as provided by law and the articles of incorporation of said Summit Investment Company, from three persons to five persons, and that the said William P. McElwain, F. E. Ryer, G. Beninghausen, L. V. Wells and E. H. McPherson shall constitute said board of trustees, and that to each of said persons shall be issued a qualifying share of stock in the Summit Investment Company, and that the balance of said stock shall be placed with some person as trustee to be held by such trustee irrevocably until the obligations of the said Wenatchee Heights Orchard Company shall have been performed or until such prior time as the parties hereto shall agree that said stock shall be delivered by said trustee to such person or persons as the parties hereto shall appoint; and,

WHEREAS, for the purpose of effectuating the foregoing objects, the said B. E. Gates and Nellie E. Gates, his wife, have transferred to the parties hereto and to their nominees all of said capital stock of said Summit Investment Company and have resigned as officers and as trustees of the said Summit Investment Company; and,

WHEREAS, It has further been agreed between the parties hereto that the new board of trustees of the said Summit Investment Company shall so administer the affairs of that company that the said Wenatchee Heights Orchard Company shall as occasion demands be supplied with such funds as may be required to perform the obligations of said Wenatchee Heights Orchard Company, so far as the same can be supplied from the assets now held by the said investment Company; and,

WHEREAS, The said William P. McElwain and F. E. Ryer have heretofore instituted a certain action in the Superior Court of the State of Washington for King County against the said Wenatchee Heights Orchard Company and the said Summit Investment Company and other persons, in which action the said G. Beninghausen has been appointed temporary receiver of the said Wenatchee Heights Orchard Company and its property, assets and effects and it has been agreed that said proceeding shall be dismissed and the said receiver discharged;

Now, therefore, it is hereby agreed as follows:

1. That to each of the parties hereto there shall forthwith be issued one share of the capital stock of the Summit [85—18] Investment Company, and that the remainder of said capital stock shall be deposited with G. Beninghausen as trustee, said stock to be held by such trustee irrevocably until the obligations of the said Wenatchee Heights Orchard Company are performed, or until such prior time as all of the parties hereto shall agree that said trustee shall be discharged and said stock delivered

to such person or persons as shall be named by all of the parties hereto. In case the said trustee shall be unwilling or unable to act, the parties hereto, or a majority of them, shall appoint some suitable and proper person to act as trustee.

2. That such proceedings shall forthwith be taken that the board of trustees of said Summit Investment Company shall be increased in number from three to five, and that all of the parties hereto shall become members of said increased board of trustees, and that the capital stock held by each of the parties hereto and by said G. Beninghausen or his successor, shall be voted for a continuance in office of said trustees or their nominees (with the right in each of said trustees to nominate his own successor, if successor be desired), until the obligations of the said Wenatchee Heights Orchard Company shall have been performed, or until the parties hereto shall have otherwise agreed.

3. That the new board of trustees of the said Summit Investment Company shall so administer the affairs of that company that the said Wenatchee Heights Orchard Company shall as occasion demands be supplied with such funds as may be required to perform the obligations of said Wenatchee Heights Orchard Company so far as the same can be supplied from the assets now held by the said Summit Investment Company, or the proceeds of said assets.

It was further stipulated that the trustee in bankruptcy now has the title to all the property formerly owned by the Summit Investment Company, the said property having been conveyed to the said

trustee by deeds dated June 11, 1913, executed by the officers of the Summit Investment Company pursuant to resolutions duly passed by the stockholders and board of trustees of said Summit Investment Company.

It was further stipulated that all rentals arising from the said property owned by the Summit Investment Company had been paid to the Wenatchee Heights Orchard Company, or to the receiver appointed by the State court, or to the trustee in bankruptcy. [86—19]

[Testimony of J. B. Lincoln.]

J. B. LINCOLN testified as follows: That he is the trustee in bankruptcy in this case; that the value of the tillable land which could be irrigated from the ditches of the bankrupt "would be increased about \$400. per acre if properly irrigated."

[Testimony of F. E. Ryer.]

F. E. RYER testified as follows: That he was one of the plaintiffs who brought the suit against the bankrupt in December, 1912; that prior to bringing the said suit he made an examination of the affairs of the bankrupt and that up to the month of October, 1911, the bankrupt was in a prosperous financial condition, its assets at that time being worth many thousands of dollars, and its liabilities much less than its assets.

[Additional Testimony of L. V. Wells.]

L. V. WELLS testified as follows: That the first threat of damage suits for failure to fulfill contracts for furnishing water was in the spring of 1910, when

(Testimony of L. V. Wells.)

one Hotchkin commenced a damage suit and recovered a judgment, which judgment was paid; the next threat of a damage suit was in the fall of 1910 when Dana Hotchkin, the son of the former man, began an action and recovered a judgment; that the said case was then on appeal to the Supreme Court and that a supersedeas bond had been given which had been signed by Mr. McPherson and the witness as sureties; that up to October, 1911, the current indebtedness of the bankrupt had been small at all times.

The minutes of a meeting of the board of trustees of the Wenatchee Heights Orchard Company, held on March 9, 1907, were offered in evidence, and the portion of said minutes which are material are as follows:

**[Minutes of Meeting of Board of Trustees of
Wenatchee Heights Orchard Co., March 9, 1907.]**

Seattle, Wash., March 9, 1907.

The first meeting of the Board of Trustees of the [87—20] Wenatchee Heights Orchard Co. was held at the office of the company in room 507 Bailey Building in the city of Seattle, Washington, on this 9th day of March, 1907, at the hour of two o'clock P. M., pursuant to an agreement and notice hereinbefore spread on the records of the company at which there were present the following named trustees, to wit: L. V. Wells, G. A. Virtue and Arthur Ward, being all of the trustees of the said company.

* * * * *

The following written proposal was submitted to

the Board of Trustees:

To the Wenatchee Heights Orchard Company.

I hereby offer to sell to you the following tract of land located about three miles from Wenatchee, Washington, to wit:

W.1½ of Sec. 25, E.1½ Sec. 26, W.1½ N. W. ¼ and N. E. ¼ N. W. ¼ and N. W. ¼ N. E. ¼ Sec. 35, E.1½ and N. 1½ S. W. ¼ Sec. 34, all in T. 22 R. 20 E. W. M., containing 1200 acres more or less, together with 63 shares of the capital stock of the Spring Hill Irrigation Co., all for the sum of Seventy-five Thousand Dollars (\$75,000) subject to a mortgage for Fifty Thousand Dollars (\$50,000) which you are to assume and pay in addition to the amount proposed to be paid to me, also subject to the following claims which are a part of the purchase price of the said land and which are to be assumed and paid by you.

L. V. Wells.....\$40,000

E. H. McPherson..... 5,850

W. G. Steward..... 8,890

A. C. McPherson..... 7,500

I propose to take in payment for this land 750 shares of the capital stock of the Wenatchee Heights Orchard Co. the same being all of the issue of the stock of the company.

Signed—L. V. WELLS.

The above letter having been read and discussed, the following resolution was unanimously adopted;

Resolved: That the proposal contained in the above communication be and is hereby accepted in all of its conditions and that the officers of the company issue 750 shares of the capital stock of the

Wenatchee Heights Orchard Co. to L. V. Wells in payment for a deed to the above land, subject to the mortgage and claims against the same. [88—21]

It further appears from the exhibits in this cause that the land which was transferred to this company at its organization was land which needed irrigation in order to make it productive. That the water right which accompanied this land was represented by 68 shares of the capital stock of the Spring Hill Irrigation Company, which owned certain water rights. This company did not sell water but divided it among its shareholders according to each shareholder's holdings. The irrigation plant of the irrigation company now includes a dam of approximately 18 feet, which impounds the waters of Stemilt Creek, so that the water from the reservoir formed by the dam may be used in the latter part of the summer when the creek becomes low.

Immediately after the incorporation of the bankrupt about 650 acres of land of the bankrupt which were suitable for orchard purposes were platted, and nearly all of this was sold either under contracts running on an average of $6\frac{1}{2}$ years, or for cash. Both contracts and deeds provided that the bankrupt was to furnish 2 acre-feet of water per acre per year to the purchasers thereof. In addition to the furnishing of water, the bankrupt was to plant, cultivate and care for the property which was sold under contract until the purchasers received deeds for their property.

In the year 1911 one Hotchkin, the owner of a

tract in this addition which embraced one of the old orchards, brought suit against the bankrupt on account of failure to furnish the water provided for in his contract, and obtained a judgment for about \$1800, which was paid. Thereafter another Mr. Hotchkin, son of the former man, the owner of 10 acres of the old orchard immediately adjoining, brought suit and recovered judgment. Shortly after the hearing in the [89—22] latter Hotchkin case in the lower court, other owners of orchard tracts cited the bankrupt to appear before the Public Service Commission of the State of Washington and show cause why it should not increase its water supply. Whereupon a hearing was had and an order of the Public Service Commission was entered finding that the bankrupt had not furnished the water called for by its contracts and requiring it to furnish plans for increasing its water supply. Thereupon the bankrupt furnished a plan whereby the Spring Hill Irrigation Company should increase the height of its dam from 18 to 30 feet, thus making additional storage capacity. This plan was approved by the Public Service Commission. The estimates for the construction of this improvement varies from \$10,000 to \$16,000, of which the share of the bankrupt would be from \$5,000 (estimate of Mr. Wells) to \$8,000 (estimate of the engineers of the Trustee).

[90—23]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

IN BANKRUPTCY—No. 5025.

In the Matter of WENATCHEE HEIGHTS OR-
CHARD COMPANY,

Bankrupt.

Order Approving Statement of Evidence.

I, EDWARD E. CUSHMAN, the Judge of the said court before whom the objections of J. B. Lincoln, as Trustee in Bankruptcy of the above-named bankrupt to the claim of L. V. Wells was tried, do hereby certify, both parties being represented by counsel in open court, that the foregoing is a true and complete and properly prepared statement of all the evidence essential to the decision of the questions presented by the appeal of L. V. Wells and by the appeal of J. B. Lincoln, the said Trustee, from the order hereinbefore entered herein upon the claim of L. V. Wells, and I do hereby approve the same as the statement of the evidence in said matter for the purpose of the said appeals, and do order that the same shall become a part of the record for the purposes of the said appeals.

Done in open court this 23d day of December, 1913.

By the Court,
EDWARD E. CUSHMAN,
Judge.

O. K.—R. D. OGDEN,
WALTER SCHAFFNER. [91]

[Endorsed]: In Bankruptcy. No. 5025. United States District Court for the Western District of Washington, Northern Division. In the Matter of Wenatchee Heights Orchard Company, Bankrupt. Statement of Evidence Upon Claim of L. V. Wells. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 13, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

*In the United States Circuit Court of Appeals in
and for the Ninth Judicial Circuit.*

No. 5025.

In the Matter of WENATCHEE HEIGHTS OR-
CHARD COMPANY, a Corporation,
Bankrupt.

Citation [on Appeal of L. V. Wells (Original)].

United States of America to J. B. Lincoln, as Trustee in Bankruptcy of the Estate of Wenatchee Heights Orchard Company, Greeting:

You are hereby notified that in a certain proceeding had in the above-entitled cause in bankruptcy in the United States District Court in and for the Western District of Washington, Northern Division, wherein L. V. Wells is claimant, an appeal has been allowed to the said L. V. Wells to the United States Circuit Court of Appeals for the Ninth Circuit, and you are therefore hereby cited and admonished to be and appear in said court at San Francisco on or before the 31st day of December, 1913, to show cause, if any there be, why the order and decree ap-

pealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of said court, this 12th day of December, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN.

Judge. [92]

We hereby admit service of the within paper this 12th day of December, 1913.

RAYMOND D. OGDEN,

WALTER SCHAFFNER,

Attorneys for Trustee.

[Endorsed]: No. 5025. United States District Court for the Western District of Washington, Northern Division. In the Matter of Wenatchee Heights Orchard Company, a Corporation, Bankrupt. Citation to J. B. Lincoln, on Appeal. Filed in the United States District Court, Western District of Washington. Dec. 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5025.

In the Matter of WANATCHEE HEIGHTS ORCHARD CO., a Corporation,

Bankrupt.

Citation [on Appeal of J. B. Lincoln, as Trustee (Original).]

To L. V. Wells, Claimant:

You are hereby notified that in a certain proceed-

ings had in the above-entitled cause in bankruptcy, in the United States District Court for the Western District of Washington, Northern Division, wherein J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company, is resisting the allowance of the claim of L. V. Wells, as claimant, an appeal has been allowed to the said J. B. Lincoln, Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company in the United States Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, said district, within thirty (30) days from and after the date hereof pursuant to a petition of appeal, Assignment of Error, filed with the clerk's office in the District Court of the United States for the Western District of Washington, Northern Division, in the matter of the Wenatchee Heights Orchard Co., bankrupt, to show cause, if any there be, why the judgment rendered in said cause affirming, except as herein modified, the Findings of the Referee in Bankruptcy, allowing the claim of L. V. Wells, as claimant, for the sum of \$56,389.16, should not be reversed as in said petition of appeal set forth, [93] and why said Order and Decree appealed from should not be corrected, as in said Petition of Appeal and Assignments of Error set forth, and why speedy justice should not be done to the parties in that behalf.

V. TNESS the Honorable EDWARD E. CUSHMAN, Judge of said Court on the 19th day of December, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,

Judge. [94]

Copy of the within citation received and due service of same acknowledged this 20th day of Dec., 1913.

CORWIN S. SHANK and
H. C. BELT,

Attorneys for Wells.

[Endorsed]: Original. No. 5025. In the U. S. District Court, Western District of Washington, Northern Division. In the Matter of the Estate of Wenatchee Heights Orchard Company, Bankrupts, Plaintiff, vs. J. B. Lincoln, Trustee. Citation—J. B. Lincoln, Trustee, Defendant. Filed in the United States District Court, Western District of Washington. Dec. 20, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[Endorsed]: No. 2358. United States Circuit Court of Appeals for the Ninth Circuit. L. V. Wells, Appellant, vs. J. B. Lincoln, as Trustee in Bankruptcy of the Estate of Wenatchee Heights Orchard Company, a Corporation, Bankrupt, Appellee, and J. B. Lincoln, as Trustee in Bankruptcy of the Estate of the Wenatchee Heights Orchard Company, a Corporation, Bankrupt, Appellant, vs. L. V. Wells, Appellee. In the Matter of Wenatchee Heights Orchard Company, a Corporation, Bank-

J. B. Lincoln.

07

rupt. Transcript of Record. Appeals from the
United States District Court for the Western Dis-
trict of Washington, Northern Division.

Received and filed December 27, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

L. V. WELLS,

Appellant,

vs.

J. B. LINCOLN, as Trustee in Bankruptcy of the
Estate of WENATCHEE HEIGHTS OR-
CHARD COMPANY, a Corporation, Bank-
rupt,

Appellee,

and

J. B. LINCOLN, as Trustee in Bankruptcy of the
Estate of the WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt,

Appellant,

vs.

L. V. WELLS,

Appellee,

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Brief of Appellant L. V. WELLS, upon his Appeal.

**Appeal from the United States District Court
for the Western District of Washington
Northern Division.**

STATEMENT OF THE CASE.

This is an appeal from an order of the District
Court modifying the order of the referee upon the

claim of L. V. Wells against the estate of the Wenatchee Heights Orchard Company, bankrupt.

The bankrupt was organized in the winter of 1906 and 1907 for the purpose of handling a tract of land in Chelan County, Washington, known as Wenatchee Heights. This tract consisted of about twelve hundred acres, of which about six hundred and fifty acres were in the Plat of Wenatchee Heights Orchard Tracts and the First Addition thereto. This six hundred and fifty acres were orchard lands, which however, required irrigation to make them productive. The water right which accompanied the land was represented by sixty-eight shares of stock in the Spring Hill Irrigation Company, which owned an irrigation system. At the time of the organization of the company there were four men interested in this tract, to-wit: L. V. Wells, E. H. McPherson, W. G. Steward and A. C. McPherson. These men had been acquiring this property since 1903. They held different tracts in different proportions, and had each put in various sums of money at different times. L. V. Wells, however, appears to have owned the bulk of the property, and the most of it stood in his name.

The minutes of the first meeting of the board of trustees of the company (*trans.* p. 98) show that the meeting was held on March 9, 1907, at which were

present all the trustees of the company, to-wit: L. V. Wells, G. A. Virtue and Arthur Ward. At this meeting L. V. Wells submitted a proposal to convey this tract of land together with the water to the company for \$187,240, payable as follows: \$50,000 by the assumption of a mortgage then on the land, \$75,000 by the issuance of the entire capital stock of the company of the par value of that amount, and the incurring of indebtedness to L. V. Wells of \$40,000, E. H. McPherson \$5,850, W. G. Steward \$8,890, and A. C. McPherson \$7,500. This offer was accepted and notes were executed to these four persons. This indebtedness to L. V. Wells of \$40,000, together with accrued interest thereon, forms a part of the claim of L. V. Wells in dispute in this action.

Thereupon the entire capital stock of the company was issued, one-half to L. V. Wells and the other half to E. H. McPherson. G. A. Virtue and Arthur Ward resigned as trustees and E. H. McPherson was elected a trustee and secretary of the company, and from that time on L. V. Wells and E. H. McPherson were the sole stockholders, trustees and officers of the company. The company thereupon entered upon the selling of its land, selling the land either for cash or upon contract. The company sold along with each tract two acre feet of water per acre,

and with its contract agreed to sell the same amount of water. When the land was sold upon contract, the contract provided that the company should retain possession of the land, plant it to orchard, and cultivate it until deeds should be issued. In this manner sales of land were made aggregating \$340,000. As the company needed money, L. V. Wells loaned to the company from his own funds sums aggregating \$12,712.95, taking notes for the most of it bearing 7 per cent interest, and this also forms a part of the claim of L. V. Wells which was approved by both the referee and the judge of the District Court. The remainder of the claim of L. V. Wells consisted of a claim for commissions upon the sale of property, and this was rejected by both the referee and the judge upon the ground that Wells and McPherson being the sole trustees could not make a valid contract with themselves for the payment of a commission. The referee charged against L. V. Wells all the money which had been withdrawn by him since the organization of the company and approved the claim for the balance found to be due in the sum of \$56,389.16.

Both the trustee in bankruptcy and the claimant filed petitions for review of this order by the District Court, and upon the said petitions the District Court entered an order affirming the action of the referee

and approving the claim, but ordered that the payment of any dividend upon this claim arising out of a considerable portion, (practically all) of the assets of the bankrupt should be postponed until all other creditors had been paid in full.

The facts upon which the court founded this order are as follows: The business of the bankrupt had proceeded prosperously until the spring of 1910. At that time one Hotchkin, who had purchased a tract of land from the bankrupt company, commenced a suit for damages for alleged failure to furnish the required amount of water called for by his deed. He recovered a judgment which was paid. Then in the fall of 1910, Dana Hotchkin, the son of the former man, also began an action. While this action was pending Wells and McPherson, the officers of the bankrupt corporation, sought to devise a method of discouraging such actions, and thereupon, for the purpose of placing the apparent title of the assets of the company out of the bankrupt corporation, adopted the following procedure. The notes which Wells and McPherson then had were taken up and in their place two notes were issued to each of them. One of these notes to Wells was for \$57,000, and one of the notes issued to McPherson was for \$18,000. An entry was made upon the records of the bankrupt com-

pany of an offer made by B. E. Gates to the company to take these two notes aggregating \$75,000 for a conveyance of practically all of the assets of the bankrupt company to the Summit Investment Company. A resolution accepting this offer was placed upon the records of the company, and thereupon a conveyance of the property was made to the Summit Investment Company, in which B. E. Gates held all the stock excepting one qualifying share which was held by his wife. The two notes of Wells and McPherson, however, were never out of the possession of the payees, there was no intention of cancelling them and they were in fact not cancelled. The property which was deeded to the Summit Investment Company was still handled as the property of the bankrupt, and all the rents accruing therefrom were turned into the bankrupt and used in the corporate business of the bankrupt. There is not the slightest evidence, either direct or circumstantial, and neither the referee nor the district judge found as a fact that the purpose of Wells and McPherson in putting through this deal was other than as stated by Mr. Wells—to discourage further actions for damages.

On December 24, 1912, William P. McElwain and F. E. Ryer, who were interested in this project, without any demand made upon anyone for the setting

aside of this transfer to the Summit Investment Company, brought an action in the Superior Court of King County against the bankrupt, the Summit Investment Company, Wells, McPherson, Gates and their wives for the purpose, among other things, of setting aside this transfer. In that action G. Benninghausen was appointed a temporary receiver upon the ex parte application of the plaintiffs. Six days after the commencement of the action an agreement (*trans.* p. 93) was made between all the parties to that action under which B. E. Gates turned all the stock of the Summit Investment Company over to the said Benninghausen. McElwain, Ryer, Benninghausen, Wells and McPherson were elected trustees of the Summit Investment Company, and all parties agreed that the assets of the Summit Investment Company were in fact the assets of the bankrupt corporation, and were to be applied to the corporate uses of the bankrupt.

This bankruptcy proceeding was instituted upon January 18, 1913, upon the ground of the appointment of a receiver in the state court. Subsequent to the appointment of the trustee in bankruptcy, the officers of the Summit Investment Company, being thereunto duly authorized by both the trustees and the stockholders, conveyed to the said trustee all the assets of the Summit Investment Company without any reservation.

There is not the slightest claim made in this action that any creditor suffered any injury, or that the estate of the bankrupt, subject to distribution among the creditors, was diminished in any respect by any of the dealings connected with the Summit Investment Company. The district judge, however, held that on account of the participation of L. V. Wells in the Summit Investment Company deal the payment of dividends upon his claim, otherwise valid, out of any of the property transferred to the Summit Investment Company, should be postponed until all other creditors were satisfied in full, and this action of the district judge in postponing the claim of L. V. Wells is the action which the appellant assigns as error upon this appeal. Wherefore the appellant makes the following

SPECIFICATION OF ERROR.

Said L. V. Wells assigns as error that the order entered in the said cause on the 11th day of December, 1913, modifying the order of the referee theretofore made in said cause upon his said claim was erroneous and unjust to this appellant, because the said order provides that the said L. V. Wells be denied the right to receive any dividends on his claim out of the proceeds realized from the assets

conveyed by the said Wells to the Summit Investment Company until all other creditors have been satisfied in full.

ARGUMENT.

In this argument we are somewhat handicapped by the fact that the theory of the case which the district judge adopted was not advanced by the trustee either in his objections to appellant's claim before the referee or his petition for revision before the judge and was not argued by trustee's counsel before the judge either by brief or orally, and we therefore have nothing to meet in argument excepting the opinion of the district judge, which is somewhat obscure as to reasons, and very deficient as to authority.

The theory upon which the district judge appears to have acted in this matter is that inasmuch as Wells was guilty of lending his claim to the perpetration of a scheme which might have resulted in hindering, delaying or defrauding some creditor, he should therefore be punished by having his claim postponed to other creditors.

The judge in his opinion makes two citations from *Cyc.* in support of his position (*trans.* p. 46), 20 *Cyc.* 487-c and 638.

The first citation is to the effect that a fraudulent conveyance is null and void as to creditors, against which we would never contend. There is not the slightest evidence in this case that anybody ever claimed that any of these assets were anything else but the assets of the bankrupt corporation.

The other citation is to the effect that where a grantee in a fraudulent conveyance is a party to the fraud, he cannot recover, as a condition precedent to the setting aside of the conveyance, any consideration which he may have paid for the conveyance or any sums which he might have paid out for the release of liens upon or improvement of the property fraudulently conveyed. We fail to see how this rule applies in this case, as the claim of the appellant did not originate in any manner in the Summit Investment Company deal. The claimant proves his claim without any reference thereto whatever.

Even this rule, however, is not of universal application, particularly in the federal courts. In *Clements v. Nicholson*, 6 Wall. 299, the Supreme Court of the United States upheld this general doctrine with the following limitation:

“A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his credit-

ors, and where he buys recklessly, with guilty knowledge. Where the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequence which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. *The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud."*

We respectfully submit that this action of the district judge runs counter to the first principle of the Bankruptcy Act. This principle is an absolute equality between all unpreferred and unsecured contract creditors regardless of the origin of their respective claims. Both the referee and the district judge found that the claim of appellant was a valid claim against the bankrupt.

§2 (2) of the Bankruptcy Act gives to bankruptcy courts the power to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." §65 (a) provides that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have a priority or are secured," and §65 (e) provides that "a claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act." The mere reading of these sections would seem to show conclusively that there is no power given to the bankruptcy court to rank claimants according to what the judge considers to be their merits or needs. If a creditor has a valid claim against the estate he is entitled to a dividend from the estate equal to the dividend of any other creditor, and no power is given to the bankruptcy court practically to fine him for actions which the bankruptcy court might not approve of, by depriving him of any portion of his dividends.

The Bankruptcy Act further provides what claims, otherwise valid, the court may refuse to approve by §57 (g), which provides that "the claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom con-

veyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or incumbrances." This we believe is the only section of the Bankruptcy Act which authorizes the bankruptcy court to refuse to approve a claim which otherwise would come within the definition of an allowable debt contained in §63, and this section gives even the creditor who has received a preference the right to prove his claim after the preference has been surrendered.

One thing which will throw considerable light upon the interpretation of this statute upon this subject is a comparison with the portion of the former act of bankruptcy upon the same subject. Section 39 of the original Bankruptcy Act of 1867 provided:

"And if such person shall be adjudged a bankrupt the assignee may recover back the money so paid, conveyed, sold, assigned, or transferred contrary to this Act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Act was intended or that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy."

This was amended later, and as so amended appears as Section 5021 Revised Statutes, as follows:

“Provided that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this Act was intended and such person, if a creditor, shall not in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation upon the proof of debts shall apply to voluntary as well as involuntary bankruptcy.”

It will thus be seen that the framers of the present Act had before them Acts which provided that in cases of actual fraud the creditor should be mulcted to the extent of all and one-half of his claim. The omission of any such provision in the present Act is cogent proof that it was the intention of the framers of the Act that all claims should stand on an equal footing after preferences had been surrendered, regardless of any fraud in connection with an attempt to obtain a preference.

In this case this claimant prior to the adjudication of bankruptcy joined with all other parties who had any control over the Summit Investment Company in a written acknowledgment that all of the assets of the Summit Investment Company were the assets of the Wenatchee Heights Orchard Company (*trans.* pp. 93 *et seq.*), immediately upon the ap-

pointment of the trustee in bankruptcy the officers of the Summit Investment Company, by the consent of all persons interested, voluntarily conveyed all this property to the trustee in bankruptcy (*trans.* pp. 96, 97), and during all the time this property stood in the name of the Summit Investment Company the rentals arising therefrom had been paid either to the bankrupt or the receiver appointed by the State Court, or to the trustee in bankruptcy (*trans.* p. 97). Most assuredly a creditor after the surrender of what might have been claimed as a preference can be in no worse situation than a creditor who did claim such preference.

The Supreme Court of the United States has repeatedly held that the fact that at some time or other one creditor has attempted to get the better of the other creditors, will not prevent the creditors from ultimately sharing equally in the assets of the debtor. This rule was upheld in several equity cases.

White v. Cotzhausen, 129 U. S. 329.

U. S. Rubber Co. v. American Oak L. Co., 181 U. S. 434.

In *White v. Cotzhausen*, *supra*, the lower court on the petition of a creditor had set aside certain conveyances and other instruments made for the

benefit of the debtor's mother, sisters and brothers as fraudulent with respect to creditors, and ordered the property to be applied in satisfaction of the plaintiff's claim. The Supreme Court upheld the lower court in so far as setting aside the transfer was concerned, but said:

“It remains only to consider the effect of these views upon the decree below. We have already seen that the circuit court proceeded upon the ground that the conveyances, bill of sale, confession of judgment and transfers by Alexander White, Jr., were made without adequate consideration and with intent to hinder, delay and defraud the appellee. Upon these grounds it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties; for the mother, sisters and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors.”

And the Supreme Court thereupon sent the case back to the lower court with instructions to find the amount due to the creditors who had attempted to make themselves preferred creditors.

In *U. S. Rubber Co. v. American Oak L. Co.*, *supra*, the court closes its opinion with the following language:

“There is a wide difference between the case of a fraud *ab initio*—such, for instance, as a scheme to enforce a false or pretended indebtedness, so as to remove the assets of an alleged debtor from the reach of his bona fide creditors—and the case of an attempt by bona fide creditors to secure preferences for themselves, but using methods forbidden by statute or by the policy of law. In the former case, undoubtedly, a court of equity will refuse to permit the guilty parties to derive any profit or advantage from the fraudulent arrangement. In the latter case a court of equity will not declare a forfeiture of just debts, or, by postponing them till all other creditors are satisfied, practically confiscate them, but will, while defeating the attempt to obtain a forbidden preference, leave such creditors to use and enjoy the same rights and remedies possessed by other creditors.”

The “methods forbidden by statute or by the policy of law” which the Supreme Court there held should not cause these creditors to forfeit their valid claims, consisted in secretly taking judgment notes, and preventing other creditors from obtaining the same preference by having subservient dummies secretly placed in control of the debtor corporation while the debtor corporation continued to do business and incur indebtedness apparently under its old officers, even to the extent of keeping the names of

the old officers upon its stationery. Surely the actions set forth in this case were morally as reprehensible as were the actions of this claimant and his co-officer McPherson in the case at bar, which consisted merely in placing in their corporate minute book a false entry, which never deceived anybody, and which was never used in any attempt to deceive anybody, and the execution and placing upon record of a deed which never injured anybody, and which was never used in any attempt to injure anybody.

The district judge, however, in his opinion states that this scheme might have resulted in the injury of some of the creditors. In the *American Oak Leather Company* case, the scheme there adopted might very well have resulted in injury to other creditors, as was pointed out by the lower court in 77 Fed. 674, as follows:

“The arrangement was not intended to provide means to pay the debt, but solely to provide a legal equipment whereby the entire assets could be quickly seized in case of disaster, and other creditors be prevented from obtaining a like advantage. Had the Fargos been dishonest, they could, under this arrangement, have appropriated to themselves the proceeds of the sales, and left to the holders of these preferential judgment notes, when the catastrophe happened, only the stock unsold, and, during the period of such dishonest appropriation, have effectually foreclosed other creditors by their arrangement with the rubber companies. It is not enough to

say that such a thing did not, in fact, happen, and that the Fargos were not, in fact, dishonest. The point is, did the rubber companies make such a dishonest appropriation an easy and natural opportunity to the debtor? If so, the transaction is, in law, a fraud. The law looks beyond the specific instance under review to the example such an instance suggests to the trading world, and to the frauds that might cover themselves under the opportunities of such an example. The arrangement under consideration is, in its practical aspects, an effectual, secret lien upon a stock of goods in trade, under circumstances that justify the trading world in giving security to the trader to which he is not entitled, and is, therefore, a much stronger case even than *Robinson v. Elliott*."

In the interpretation of the bankruptcy law, we respectfully submit that the Supreme Court of the United States has clearly held that the only valid reason for refusing approval to a debt which comes within the provisions of Section 63 is that the creditor is still retaining one of the preferences mentioned in Section 57 g.

Hutchinson v. Otis, Wilcox & Company, 190 U. S. 552;

Keppel v. Tiffin Savings Bank, 197 U. S. 356;

Page v. Rogers, 211 U. S. 575.

In *Hutchinson v. Otis, Wilcox & Co.*, 190 U. S. 552, a creditor having taken judgment against the bankrupt, attached debts due to the bankrupt, and obtained satisfaction of its judgment thereby, and

entered full satisfaction upon the record in the court. Subsequently Otis, Wilcox & Co. paid over to the trustee the full amount of the respective debts, and filed a claim in bankruptcy for the amount paid back. The Supreme Court said:

“When Otis, Wilcox & Co. paid the debts out of which they had received satisfaction, they undid the satisfaction, and the trustee in bankruptcy knew it. We see no sufficient ground on which he can deny the consequence that the right to prove revived.”

In *Keppel v. Tiffin Savings Bank*, the Circuit Court of Appeals for the sixth circuit propounded to the Supreme Court the question:—“Can a creditor of a bankrupt who has received a merely voidable preference and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustees, thereafter prove the debt so voidably preferred?”

The Supreme Court answered this question in the affirmative, saying:

“It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt and thus suffer no other loss than the costs of litigation. The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them.”

Counsel for the trustee may attempt to distinguish this case by asserting that the Supreme Court relied upon the "good faith" contained in the question propounded. In the later case, however, of *Page v. Rogers*, 211 U. S. 575, there is not the slightest suspicion of good faith in the decision of the court. On the contrary, in the decision in this case of the Circuit Court of Appeals for the sixth circuit contained in 140 Fed. 596, it appears that there were strong evidences of fraud, a claim through an altered trust deed, uncertainty of testimony as to when this trust deed was delivered and whether it ever was delivered, and many other suspicious circumstances pointing to fraud and bad faith, if nothing worse, and in summing up its opinion thereon the Circuit Court of Appeals stated (p. 605):

"Taking all the facts and circumstances of the case together, we are not convinced that the court below erred in holding this mortgage invalid for want of good faith, irrespective of whether it was intended to go into effect when delivered in 1899 under the agreement against registration. That agreement, we are convinced, was made for the purpose of enabling I. B. Merriam to hold himself out as the owner of this coal land. This he did. He was thereby enabled to continue in business for several years; his debt constantly increasing. The fact that this was a secret lien gave this property the appearance of being unincumbered, and was the moving inducement of some of his existing creditors to grant delay

by extension and renewal. The debtor actively represented this land as an available asset which he was in constant expectation of selling, and that the proceeds would pay all his debts and disincumber his other property. These representations operated to quiet his existing creditors and to obtain from some of them extensions and renewals and new credit in at least one proven case. Neither is the unexplained alteration of the mortgage, aside from its technical effect as an alteration, consistent with a bona fide purpose to secure a lien for an honest debt. These facts and others, not so important, but yet of some weight which appear in the transcript, convince us that the lien claimed was not a bona fide lien of more than four months' existence at date of bankruptcy."

The Circuit Court of Appeals thereupon came to the conclusion that the executors of Thomas Merriam should account to the trustee in bankruptcy for all the proceeds of the sale of the bankrupt's interest in this coal land which were applied to the debts and claims of Thomas Merriam and to the debts and claims upon which Thomas Merriam was liable, but not for the proceeds of this sale which actually went to the benefit of the estate.

The Supreme Court held that the question of whether the preferred creditor had been guilty or not guilty of actual fraud was of no moment in this case, saying: "The alternative ruling that the trust deed was invalid for want of good faith and because it was agreed to be withheld from record to mislead

and defraud creditors may be disregarded. Therefore we need not consider whether the bill should have been amended to permit an attack on the deed as fraudulent.”

After thus deciding that the question of fraud or no fraud was immaterial, it modified the judgment which had been entered by the Circuit Court of Appeals, stating: “All that has been said would naturally lead to an affirmance of the decree. Nevertheless we are of the opinion that it ought to be modified for a reason not dwelt upon in argument. Now that this litigation has come to an end and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. * * * The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed and the case remanded to the district court to take proceedings in conformity with this opinion.”

It will thus be seen that the Supreme Court has held in this opinion that if a creditor has a valid indebtedness against the bankrupt and is not ultimately to retain an illegal preference, he may recover his dividend and it is entirely immaterial that in transactions connected with this very indebtedness he has been guilty of fraudulent conduct.

Another theory upon which the decision of the district judge might be attempted to be upheld is, as stated in the judge's opinion:

“By their acts, both as creditors and for the corporation, said company's property was transferred in such a way, as found by the referee, that neither they nor the corporation could recover it. The other creditors, alone, could compel its return to the corporation. They did so. To now hold that the claimants, who were parties to such transfer, may resort to the property they helped put out of the reach of the corporation and themselves, the same as the other creditors, would neither tend to encourage innocent creditors to diligence, nor discourage those dishonestly inclined from scheming for an unfair advantage.” (*Trans.* p. 46.)

The trouble with this theory is that it is borne out neither by the facts nor by the law. This is not a contest between the Orchard Company or Wells as a creditor and the Summit Investment Company standing squarely upon the conveyance to it and in the situation which existed immediately after the

execution of the deed to it. At the time of the institution of bankruptcy proceedings there had been executed the agreement of December 30, 1912 (*trans.* p. 93 et seq), by which every one connected with the Summit Investment Company had recognized the assets of this company as in fact the assets of the Wenatchee Heights Orchard Company, and which was a legally enforceable contract against the Summit Investment Company in favor of the Orchard Company, and all persons claiming rights thereunder, including this claimant.

The conclusion of the district judge when he states that this claimant helped to put this property "out of the reach of the corporation and themselves," is not borne out by the facts. The property, as the outcome shows, was, upon demand, within the reach of the corporation and was voluntarily returned immediately upon demand being made. Although the purpose of this transfer, as stated by Mr. Wells, was to discourage litigation in the way of damage suits, it does not appear in the record that any one was in fact either hindered, delayed or defrauded, and if anyone had been so hindered, delayed or defrauded, it is only reasonable to believe that it would have been shown upon the hearing upon this claim.

Altogether four different hearings were had before Judge Hoyt in this matter upon which the Summit Investment Company deal was taken up, to-wit: February 11, 1913 (*trans.* p. 86), June 11, 1913 (*trans.* p. 70), June 23-24, 1913 (*trans.* p. 75), and September 3, 1913 (*trans.* p. 70), and Judge Hoyt, the referee who conducted these hearings, in his order refused to find this claimant guilty of any intentional fraud in the entire proceedings.

The trustee obtained these assets by deed which contained no reservation whatever. The Summit Investment Company never asserted any claim against this property adverse to the claims of the Orchard Company but, from the time when it received conveyance, has turned over all the rents and profits to the Orchard Company as the assets of the Orchard Company and, as appears from its actions, has at all times been ready to recognize the rights of the Orchard Company when called upon. The trustee received these assets and now holds them as the assets of the bankrupt, and to permit certain creditors to obtain a preference in these proceedings would be violative of the first principle of the Bankruptcy Act, which is, in the closing language of Mr. Justice Brown in *First National Bank v. Staake*,

202 U. S. 141, "designed to secure equality among all creditors."

The last word upon this question of the relative situation between different classes of creditors in the proceeds of a conveyance which has been abandoned or set aside, is contained in *L. A. Becker Co. v. Gill*, 206 Fed. 36, wherein an attempt was made to postpone the claim (as a general creditor) of a conditional sale vendee who had abandoned any claim under his conditional sale contract. The Circuit Court of Appeals of the eighth circuit, however, speaking through Hook, Judge, said:

"The trial court, having held the unrecorded contract of conditional sale void as to creditors who became such after it was executed, then ruled that, while appellant might prove its claim as a general creditor, it could not participate equally with them because they, the subsequent creditors, had an equitable lien on the property in question superior to the prior general creditors, and were first entitled to the proceeds. The court followed *In re Wade* (D. C.) 185 Fed. 664, and *Simmons v. Greer*, 98 C. C. A. 408, 174 Fed. 654. We think the right of the subsequent creditors is merely a defensive one against the holder of the contract of conditional sale who has failed to comply with the registry statute, and that it is not a lien giving them a preference upon distribution in bankruptcy. It prevents the successful assertion against them of an unrecorded instrument, but does not in addition confer an affirmative right against others. In such cases the defense against the unrecorded instrument is generally due directly or primarily to the provisions of the statute. In a broad

sense the statute is founded upon considerations of justice and equity which are recognized and frequently referred to by the courts in construing and applying it, but it was not intended by such references to give the parties so protected a substantive lien superior to others. *If the holder of the unrecorded instrument made no claim on it, but was content to be a general creditor, it would hardly be contended that subsequent creditors upon discovering its existence could bring it up themselves as ground for a lien or preference over creditors otherwise of the same class.* It does not seem admissible that the existence of such a lien should depend upon the assertion of the unrecorded instrument by the holder and his failure. Equity has a large place in the administration of the bankruptcy law, but so far as may be without disturbing positive rights the dominant note is that "equality is equity." An assignment for the benefit of creditors which is vacated by proceedings in bankruptcy may yet be used to defeat, for the benefit of the estate, an intervening execution levy. *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171. Section 67f of the present Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) provides that liens obtained by legal proceedings within four months prior to the filing of the petition in bankruptcy shall be void unless the court preserves them for the benefit of the estate. In *First National Bank v. Staake*, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, liens of attaching creditors void under the section cited were nevertheless preserved for the trustee against a prior unrecorded conveyance by the bankrupt which solely regarded was valid between the parties and as to the trustees. And the property so saved was for the general estate, not for a special class of creditors. If in the case at bar liens had been obtained by the subsequent creditors by judicial proceedings within the four

months, they would, in the discretion of the court, have been set aside or retained for the benefit of the general estate in bankruptcy. Yet, it is urged that by an equitable lien, purely by construction, the subsequent creditors regardless of proximity in time to the bankruptcy proceedings secure a preference they might not have been able to get by industrious resort to the courts. In equity it would appear that when appellant's contract is out of the way its right of participation is equal to that of subsequent creditors. Its property enriched the estate of the bankrupt as well as theirs, and to deny it a ratable participation would be an undue punishment for an ineffectual attempt to secure or protect itself."

In conclusion, we respectfully submit that an analysis of the actions of this claimant shows that he never had any intention of actually depriving any creditor of his just rights in this estate. It is true a conveyance was made to the Summit Investment Company, but all of the revenue arising from the property was turned back to the bankrupt company and used for the company purposes. The suit which was begun in the superior court was begun without any notice whatever having been given to the claimant or demand for any restoration, and six days after this suit was begun we find this claimant entering into a written agreement with all other parties concerned acknowledging that the assets of the Summit Investment Company are in fact the assets of the Wenatchee Heights Orchard Company and

were to be used in carrying on the business of the Orchard Company, and later, as soon as a trustee in bankruptcy is appointed who could hold the title to the property, the property is voluntarily surrendered to the trustee. There is not the slightest evidence of any attempt to hinder, delay or defraud other than the mere fact of the entry in the minutes of the Orchard Company (which does not appear to have ever been shown to anyone) and the execution and recording of the deed (which does not appear ever to have deceived or harmed anyone). All the other actions of this claimant point to a bona fide intention and desire faithfully to carry out the corporate objects and purposes of the company at considerable sacrifice of his own personal interests. Among some of these actions are his loaning to the company various sums aggregating over \$12,000, including over \$3,000 loaned to the company subsequent to the Summit Investment Company deal, \$2,000 of which he borrowed from the bank upon his own note to lend to the company. He personally guaranteed the performance of many of the contracts of the bankrupt company. When a judgment was obtained against the company he and McPherson signed the super-seedeas bond as sureties to enable the company to appeal to the Supreme Court. Right up to the insti-

tution of the receivership proceedings this claimant was ever ready to help out the bankrupt corporation by personal advances of money and by the loan of his credit. We respectfully submit that, even if fraudulent conduct could have the effect of postponing a just claim in bankruptcy, such fraudulent conduct does not appear in this case and that the decision of the referee who saw and heard this claimant testify before him on two different occasions (June 23, 1913, and September 3, 1913) and heard his co-officer McPherson testify before him on two other different occasions (June 11, 1913, and February 11, 1913), and failed to find them guilty of any actual fraud, should be upheld, and that the order of the District Court modifying the order of the referee should be reversed, with instructions to affirm the order of the referee.

Respectfully submitted,

CORWIN S. SHANK and

HORATIO C. BELT,

Attorneys for Appellant, L. V. Wells.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. LINCOLN, as Trustee in Bankruptcy of the Estate of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

Appellant.

vs.

L. V. WELLS,

Appellee.

No. 2358.

In the Matter of the WENATCHEE HEIGHTS ORCHARD COMPANY, a Corporation, Bankrupt.

Brief on Behalf of J. B. Lincoln, as Trustee of the Estate of the Wenatchee Heights Orchard Company, a Corporation, Appellant.

RAYMOND D. OGDEN and
WALTER SCHAFFNER,

*Attorneys for J. B. Lincoln,
Trustee, Etc., Appellant.*

IN THE
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FOR THE NINTH CIRCUIT

J. B. LINCOLN, as Trustee in Bank-
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PANY, a Corporation, Bankrupt,

Appellant,

vs.

L. V. WELLS,

Appellee,

No. 2358.

In the Matter of the WENATCHEE
HEIGHTS ORCHARD COMPANY, a
Corporation, Bankrupt.

Brief on Behalf of J. B. Lincoln, as Trustee of the
Estate of the Wenatchee Heights Orchard
Company, a Corporation, Appellant.

STATEMENT OF FACTS.

Between the years 1903 and 1906, L. V. Wells, the claimant, E. H. McPherson, A. C. McPherson and W. C. Stewart acquired practically twelve hundred acres of land in the vicinity of Wenatchee, Chelan County, Washington, a large part of which was suited for and intended to be developed as apple orchards. (Record, pp. 76 and 77.) The total purchase price of this property was approximately sixty-eight thousand dollars. (Record, p. 77.) A portion of this purchase price was paid by placing

a mortgage of fifty thousand dollars upon the property and using approximately thirty thousand dollars of this amount towards paying for the property, and the balance in improving.

In the year 1907 there was formed by L. V. Wells and E. H. McPherson the Wenatchee Heights Orchard Company, the bankrupt herein. This corporation had a capital stock of seventy-five thousand dollars. Wells transferred to the bankrupt corporation all of the property thus acquired by himself and the three others, in consideration of the assumption by the corporation of the mortgage of fifty thousand dollars, the issuance to him of all of the capital stock of the corporation as fully paid, and the payment by the corporation of the following sums:

To L. V. Wells, \$40,000.00; to E. H. McPherson, \$5,850.00; to A. C. McPherson, \$7,500.00; to W. C. Stewart, \$1,890.00. These last four amounts were paid by the issuance by the corporation of its notes, and the note to L. V. Wells of \$40,000.00 is a part of the indebtedness claimed by him at the present time, and it was allowed by the court below. (Record, p. 79.)

Immediately after the organization of the cor-

poration and the transfer to it of the property, it platted about one-half of the property into orchards and actively commenced the sale thereof. The total selling price of the property was approximately three hundred and forty thousand dollars. (Record, p. 79.) It was sold, however, upon contract which provided that the payments should extend over a period of from five to seven years, without interest, during which time the corporation should care for, cultivate and irrigate the property without cost to the purchaser, and should pay all taxes and assessments levied upon the same. (See Exhibit "A" to original petition, Record, p. 8.)

The capital stock turned over to Wells was then divided equally between himself and E. H. McPherson. These two were, at all times, the only officers, trustees and stockholders of the bankrupt corporation.

There is in the record no absolutely definite testimony as to the respective interests of the four men who owned this property prior to incorporation. The most definite is the statement of E. H. McPherson, on page 72 of the printed record, that the interest of Stewart was about one-half as large as his (McPherson's). It is also admitted that the notes received by Stewart and A. C. McPherson at the

time of the incorporation were in full payment of their interest in the property.

The bankrupt continued to sell the same under the contracts before mentioned without any legal obstacles being encountered until the year 1911. At that time one of the purchasers commenced an action for damages, by reason of the failure of the corporation to furnish sufficient water under its contracts. Judgment was recovered in that action, and subsequently paid. In the following year another action was commenced by another property owner, upon the same grounds, and judgment was recovered, which was appealed and subsequently affirmed by the Supreme Court of the State of Washington. (*Hotchkin vs. Wenatchee Heights Orchard Company*, 134 Pacific 1055. (Record, p. 100.) About the time that this second suit was instituted, Wells and McPherson realized that if it was possible for these parties to obtain judgment, it would be possible for all the other purchasers of land to also secure judgment, and thereupon there was originated a scheme which is fully set forth in the opinion of the court below, found on page 132 of the record. At a meeting of the trustees of the Wenatchee Heights Orchard Company, (the trustees being the appellee herein and McPherson),

a proposition was made by one B. E. Gates in which Gates asserted that he owned notes of the Wenatchee Heights Orchard Company issued to Wells and McPherson, one of which was the \$57,000.00 note upon which the claim of Wells is in part based and the other in favor of McPherson, the remaining trustee, and that in payment of these notes he would take certain property described in the proposition. This proposition was accepted by the Board of Trustees and the property was thereupon transferred to the Summit Investment Company, which had been organized by Gates for the express purpose of taking title, and in which Gates and his wife owned all the stock. The reason for this entire deal is set forth in the testimony of Wells, quoted by the court below and found in the statement of evidence at pages 90 and 91.

The remaining purchasers of land commenced an action before the Public Service Commission of the State, as the result of which an order was entered finding that the corporation had, at no time, furnished the amount of water it had contracted to furnish, nor the amount necessary to properly irrigate the lands sold by it, and required it forthwith to enlarge its reservoir so as to have additional facilities. (Record, p. 101.)

In December, 1913, an action was commenced in the Superior Court of King County, Washington, by persons claiming to be creditors, against the Wenatchee Heights Orchard Company, the Summit Investment Company, Wells, McPherson and Gates, in which it was sought to set aside conveyances to the Summit Investment Company. In that action a temporary receiver was appointed. Attempts were made to settle the litigation and as a result an agreement was entered into between the parties to the action, which is fully set forth, beginning at page 93 of the printed record, as a result of which all the stock of the Summit Investment Company was transferred to one Benninghausen, as trustee, it being stipulated that the proceeds of the property and the rentals derived therefrom were to be used for the purpose of paying the obligations of the Wenatchee Heights Orchard Company. These attempts at a settlement resulted, however, in failure, and a permanent receiver was appointed in the state court. This receiver collected rents and profits from all the property of the corporation, including that transferred to the Summit Investment Company. Thereafter proceedings in bankruptcy were filed and an adjudication followed. Some time after the appointment of a Trustee in Bankruptcy

the Summit Investment Company, at a special meeting of its stockholders and all its Trustees, by resolution, reciting that the conveyance to the Summit Investment Company had been declared by the District Court of the United States in the bankrupt proceedings to be in fraud of creditors of the Wenatchee Heights Orchard Company, directed its officers to execute a deed of the property to the Trustee in Bankruptcy. This was accordingly done.

The appellee, L. V. Wells, filed a claim in the sum of \$73,971.26, based on two notes, one for \$57,000.00, and one for \$20,708.31, and certain other items not now in controversy, and conceding an offset of \$7,000.00. The two notes are made up of the original note of \$40,000.00, given in part payment for the land, and of an alleged balance due for commissions. The latter claim was totally disallowed by the Referee. The claims in addition to the two notes were not contested by the Trustee, leaving as the only portion of the original claim in dispute at the present time that portion of the \$57,000.00 which represents the \$40,000.00 note originally given at the time of the incorporation of the company, together with the accrued interest thereon.

In addition to this, the Trustee claims that the transactions between Gates and the Wenatchee

Heights Orchard Company represented by Wells and McPherson constituted payment of the \$57,000.00 note, and that therefore there is nothing whatever now due upon the same.

SPECIFICATION OF ERRORS RELIED ON.

I.

That the court should have held that there was nothing due from the corporation to L. V. Wells, but that on the contrary it should have held that the said Wells was indebted to the corporation in the sum of seventy-five thousand dollars for his subscription to the capital stock of the bankrupt.

II.

That the court should have held that the note for fifty-seven thousand dollars attached to the proof of claim and upon which the claim was in part based was fully paid and satisfied.

III.

That the claim of L. V. Wells should have been disallowed *in toto*.

BRIEF OF THE ARGUMENT.

I.

The alleged payment of the capital stock by the transfer of the land was a mere fiction and Wells should now be held for the amount of the capital subscribed for by him.

Camden vs. Stuart, 144 U. S. 104.

2 *Clark & Marshall on Corporations*, 1244.

Adamant Mfg. Co. vs. Wallace, 16 Wash. 614.

Lantz vs. Moeller, 34 Wash. Dec. (Advance Sheets) 309.

II.

There is a presumption in law that the written accounting between the parties was unfavorable to Wells as he did not produce it or explain its absence.

Kirby vs. Tallmadge, 160 U. S. 379.

Runkle vs. Burnham, 153 U. S. 216.

Graves vs. United States, 150 U. S. 118.

III.

Wells is estopped to claim that he did not transfer the note for \$57,000.00 to Gates.

Aborn vs. Rathbone, 8 Atl. 677.

IV.

The conveyance to the Summit Investment Co. being actually not only constructively fraudulent and Wells having participated in the fraud he cannot now recover the consideration for the transfer.

Railway Co. vs. Soutter, 12 Wall. 517.

Burt vs. C. Gotzian & Co., 102 Fed. 937.

Lynch vs. Burt, 132 Fed. 417.

Sabin vs. Anderson, 40 Pac. 870.

In re Friedman, 164 Fed. 131.

Ferguson vs. Hillman, 12 N. W. 389.

Kurtz vs. L. Voight & Sons, 75 S. W. 386.

2 *Moore on Fraudulent Conveyances*, p. 644.

Bump on Fraudulent Conveyances (4th Ed.)
445.

V.

The property not having been returned till after adjudication and the election of a trustee, the claim cannot be proved, as its validity must depend upon its status on date of filing petition.

Bankruptcy Act, Sec. 63.

Colman vs. Withoft, 195 Fed. 250.

Watson vs. Merrill, 136 Fed. 359.

ARGUMENT.

I.

The court below found that the original transaction between Wells and the Wenatchee Heights Orchard Company, by which Wells transferred to the bankrupt the land which later became embraced in the Wenatchee Heights Orchard Tracts, was not so fraudulent, nor was the property taken by the bankrupt at such an excessive valuation that the Trustee can now complain thereof. In other words, it was held that this sale constituted a fair payment of the capital stock of the bankrupt. We believe that a fair reading of Wells' and of McPherson's testimony indicates that, in truth and in fact, the real consideration for the transfer of this land by Wells to the Wenatchee Heights Orchard Company was the execution by the corporation of the notes mentioned in the proposal, and that the capital stock was a mere gift or bonus.

McPherson testifies that he had about a one-quarter interest and that Stewart's interest was about one-half of McPherson's. For this interest Stewart received \$8,890. Eight times that amount would be in the neighborhood of \$70,000. The total amount of the notes given to the four men at the

time of the transfer was \$62,000. A. C. McPherson had approximately a one-eighth interest and he received \$7,500. Eight times that amount would be approximately \$60,000. Is it conceivable that A. C. McPherson and Stewart, if they believed this property to be really worth \$200,000, would have taken these amounts for their one-eighth interests. It is admitted on all sides that these amounts were received by them in full payment of their interest in the land. Why should Stewart and A. C. McPherson present to Wells and E. H. McPherson approximately \$150,000? No explanation is given by Wells.

It is true that Wells and McPherson both testified that they considered the property worth \$200,000, and it is also true that no other testimony was offered by either party. The court, however, is not obliged to accept the valuation of one of the parties to the suit, where no basis for it is shown and where the parties' expert knowledge is, at best, very slight. Wells and McPherson both testified that there had been, at the time of the incorporation, a written statement of account between the four partners in the business and that this statement showed the valuation then placed by them on the property. Each testified that he did not know where that

document now was, but that he believed he had it. Record, pp. 73 and 80.) Wells was recalled thereafter to the stand by his own counsel. No explanation was given by him as to whether he had made any search for the statement, whether he had found it, or whether he had been unable to find it. The reasonable presumption, in fact the only presumption that can be indulged in, in fairness to his counsel, is, that if such a document ever existed, and if the document did show what Wells and McPherson both testified it did, that the partner settled on a basis of \$200,000, that the first question which would have been asked Wells would have been, whether he had searched for the paper and whether he had been able to discover it, and, having discovered it, to produce it. Not a single word, however, was heard from them upon the subject of this statement.

Counsel make much of the fact that the property in this case was sold for a total selling price of \$340,000, and that this shows it was worth \$200,000 when conveyed to the corporation. We might equally as well say that the property was purchased for \$68,000 by Wells and McPherson and their partners, and that shows it was not worth more than \$62,000 of notes for which it was trans-

ferred to the corporation, after it had been encumbered by a mortgage for \$50,000. It is true that the property was sold for \$340,000, but the property was not sold for cash. The property was sold under a contract which provided that the payments were to extend over periods of time ranging from five to seven years, without interest. The corporation was to plant orchards upon the property and during the whole time of payment and for one year thereafter it was to care for, farm and irrigate the land without cost. In addition to this, the corporation agreed to pay fifteen per cent commission upon the sale of the land. It also agreed to deliver two acre feet of water per acre per year to each one of the purchasers. That stipulation was of the utmost value to the purchaser. Without the water the land was worthless. With the water it was worth the high price which they paid of about \$500 per acre, and the record in this case shows that it has been judicially and conclusively determined that they never had two acre feet of water per acre per year, and never could deliver it. In other words, what was sold was not the property which the bankrupt purchased of Wells and his partners, but that property together with an agreement to deliver more water, sufficient to make the project a paying or-

chard property, and it was that difference between the water which Wells actually conveyed to the bankrupt and the water which the bankrupt agreed to turn over to its purchasers, but failed to do, that made the value of the land. So that we can deduct, first, from this \$340,000, fifteen per cent commission, or \$51,000. Deduct also the mortgage of \$50,000, because the property was to be conveyed for this \$340,000, free of encumbrances. Now it is well known that land sold in small tracts brings approximately twenty-five per cent more, at the very least, than land sold in blocks of twelve hundred acres, so that from the \$340,000 one should also deduct this amount, or approximately \$85,000, bringing the net value of the land down to \$155,000. This leaves out of consideration, absolutely, the cost of irrigating, planting and plowing and caring for six hundred acres of orchard lands for a period of seven years. It leaves out of consideration, absolutely, the fact that the corporation never had, and never delivered the water which it agreed to by these contracts aggregating this amount of \$340,000, so that, without these considerations, we find the property was estimated by Wells and McPherson, when they came to sell it on behalf of the corporation, at a price of \$155,000, with the obligation on the corporation's part to care for it for

seven years and to deliver additional water. It had been purchased by Wells and McPherson for \$68,000. They had encumbered it for \$50,000 and they sold this equity to the corporation for \$132,000. The most that the corporation could receive for the equity was \$155,000. Out of this they had to pay the entire cost of planting six hundred acres of orchard, of caring for them and developing them for seven years. This Mr. Wells himself estimates at \$100 per acre, or \$60,000, which leaves a net value of \$95,000, and this \$95,000 was upon the basis that the corporation agreed to deliver twice the water that it actually had. That this is not a mere matter of abstract mathematics is shown by the fact that the Wenatchee Heights Orchard Company in its ledger, which was offered for evidence, entered the value of the real estate purchased by the corporation from Wells at \$92,800.

We submit that this testimony falls short of showing that this property was worth the \$200,000 that Wells and McPherson now claim. It shows that at the time they believed it to be worth just exactly what they paid for it; that the agreement between the four partners was that they were to transfer the property to the corporation, that each of them was to receive a note for the amount he

had in the property, and that Wells and McPherson, who were to take it over, were to have whatever stock their own corporation issued for their profit in handling it. Why else should the other two men, who were parting with their interest in the property, permit Wells and McPherson at the same time to have notes? They parted with everything and they had no security prior to that of Wells and McPherson themselves. In fact, if the corporation failed, Wells, by reason of his larger note, would have been in absolute control.

The law was very well stated by Mr. Justice Brown, in *Camden vs. Stuart*, 144 U. S. 104-113:

"It is the settled doctrine of this court that the trust arising in favor of creditors by subscription to the stock of a corporation cannot be defeated by assimilated payment of said subscription, nor by any device short of an actual payment in good faith, and while any settlement or satisfaction of such subscription may be good as between the creditors and the stockholders it is unavailing as against the claims of the creditors. * * * Nothing that was stated in the recent cases of *Clarke vs. Bever*, 139 U. S. 96; *Fogg vs. Blair*, 139 U. S. 119, or *Hendlin vs. Stutts*, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases except as applied to the original subscribers of the stock."

In Vol 2 Clark and Marshall on Corporations, page 1244, the rule is also laid down:

“In this country it is well settled that a court of equity, and in some jurisdictions, under the statutes, a court of law, may compel full payment for stock, contrary to the actual agreement between the stockholders and the corporation when such payment is necessary to prevent a fraud upon the creditors of the corporation. Since the capital stock of a corporation constitutes the basis of its credit, persons dealing with a corporation have a right to assume, unless there is something to show the contrary, that the full amount of its issued capital stock has been actually paid in or secured to be paid in, either in money or its equivalent, so that it may be reached, if necessary, for the satisfaction of corporate debts. As a general rule, therefore, any agreement between a corporation and its stockholders under which its capital stock is issued and falsely held out to the public as full-paid, when it is not paid for at all, or is paid for in part only, either in money or in property, labor, or services, while it may be binding as between the corporation and the persons to whom the stock is issued, or their transferees, and as against other stockholders who participate, consent or acquiesce, and as against creditors who have not dealt with the corporation on the faith of such stock being full paid, is invalid as against creditors who have dealt with the corporation on the faith of the stock being full-paid; and the agreement will be set aside or disregarded in equity, or, by statute in some jurisdictions, even at law, and full payment for the stock enforced, at the instance of creditors, or of a

receiver or other person representing them, if such payment is necessary for the satisfaction of their claims."

The rule in the State of Washington was laid down by the Supreme Court in the case of *Adamant Mfg. Co. vs. Wallace*, 16 Wash. 614-617. After announcing its adherence to the trust fund doctrine the Court says:

"This being true, then it must necessarily follow, for the protection of those who dealt with these corporations that the stock subscribed for must be paid for in cash or in property of an equivalent value. In other words, the corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out to have a capital stock of \$100,000 when the capital stock, which is, and must be under the theory of the law, assets in the hands of the corporation, is worth only one-half that amount, the corporation to that extent is doing business under false colors, and is obtaining credit upon the faith of an asserted estate which is purely fictitious. And where by any arrangement between the corporation and the stockholders the stock is issued as fully paid up, when in fact it has not been paid to the full extent of its face value but has been paid in property of a fictitious or inflated value, a court of equity will compel a payment by the stockholder for the benefit of the creditor who has dealt with the corporation relying upon the asserted value of its assets to the full amount or face value of the stock. Such is almost the universal holding of the courts of the present day."

The last word in the State of Washington on the question of the payment of capital stock by transfer of property was spoken by the Supreme Court on November 28th, 1913, in the case of *Lantz, Receiver, vs. Moeller*, 34 Wash. Dec. (Advance Sheets) 309. In that case, after stating that the decisions of the court have not been harmonious upon the subject the court quotes with approval a portion of the paragraph just quoted by us from *Adamant Manufacturing Co. vs. Wallace, supra*, and then says:

“We think that the rule as laid down in the *Adamant* case is not only legally but ethically sound and all the decisions of this court which are not in harmony with the views therein expressed are overruled.”

Authorities could be cited as indicated in the opinion in the *Adamant* case from which we have just quoted, from almost every State in the Union. The question is not so much one of law, however, as one of fact. That must be determined from the circumstances surrounding each case. In the case at bar we believe that the record shows that the real transaction was the transfer of the land for the notes and that the capital stock was a mere bonus.

In considering this feature of the case it should be borne in mind that, as pointed out, the appellee

Wells testified that when the corporation was formed he and his partners made up a written statement of their account which showed the value they placed upon each separate piece of property. He said that he was not sure what had become of this memorandum but that he might have it in his possession. Although recalled to the stand by his own counsel at a later date he made no explanation of his failure to produce the paper. He did not claim to have searched for it or attempted in any way to bring it before the court. Under these circumstances the presumption is that the document if produced would contain evidence which is unfavorable to the witness.

Kirby vs. Tallmadge, 160 U. S. 379.

Runkle vs. Burnham, 153 U. S. 216.

Graves vs. United States, 150 U. S. 118.

II.

Of one set of material facts in the record there is and can be no question whatever. Those are with relation to what actually took place at the meetings of the Wenatchee Heights Orchard Company at which the conveyances to the Summit Investment Company were authorized. Those minutes are found at pages 82 to 85 of the record, and they

set forth fully and completely all that was done. There were only two men who were present at those meetings. There were only two men who had any interest in the Wenatchee Heights Orchard Company or in the property to be conveyed by it. Those two men were Wells and McPherson. If there was any fraud in connection with this transfer, they, above all men, must have known of it and participated in it. At that meeting it was represented by Mr. Gates, in a letter which was read to the meeting, among other things, that he was the owner of the \$57,000 note attached to the proof of claim of L. V. Wells filed in this case. As a consideration for that note and one other issued to McPherson he offered to take the property described in his letter. Wells and McPherson accepted the transfer and carried out the contract made by the offer and its acceptance. On the faith of the statement in Gates' letter that he was the owner of this note the corporation acted and conveyed its property. That representation to the corporation was made by three men—Gates, Wells and McPherson. They all took part in representing that the note had been transferred by Wells to Gates and that Gates was now the owner of it, and, on the strength of their representations, they induced the corporation to transfer practically all

of its assets in payment of the note. The property that the corporation conveyed in the payment of these notes was valued by Gates himself, in the proposal, at \$108,000. It is now claimed by Wells that this note, which he represented to the corporation, of which he was president and trustee, had been by him conveyed to Gates, was not, in fact, so transferred; that, as a matter of fact, he wilfully falsified the record of the Wenatchee Heights Orchard Company, and induced that corporation to transfer property, which he then believed was worth over \$100,000, in payment of a note which the person to whom the property was conveyed did not own, did not have possession of, and did not have the slightest interest in. In other words, that by a deliberate misrepresentation to the corporation, and by a deliberate falsification of its books, he induced the corporation to transfer, for his benefit, over \$100,000 of the property without the slightest benefit to it whatever; on the one hand representing to the corporation that it would be paying a note for \$57,000, which he had transferred, and, on the other hand, holding the note himself and insisting that it was then and at all times thereafter a valid outstanding obligation of the corporation.

It is, we believe, a well settled proposition of

law that a person who persuades another by means of his representations to do an act, or part with property, the person making the representations is forever estopped from denying the truth of those representations. If there is any distinction between the corporate entity and those who compose the corporation, then surely Wells, in this case, is estopped as against the corporation to deny that he had, at the time of the transfer, transferred the note for \$57,000 to Gates.

In the case of *Aborn vs. Rathbone*, 8 Atl. 677, the Supreme Court of Connecticut had before it a case where the plaintiff brought suit upon an account; payment was pleaded and there was offered in evidence a receipt reciting that it was in full payment. The answer to this was, that the receipt was marked "in full" in order that, by showing this receipt in full to his other creditors the defendant would be enabled so much the more easily to procure a settlement from them on favorable terms, and that it was agreed between the plaintiff and defendant that, as between them, the receipt should be considered only as on account. The court says:

"The general principle laid down with regard to receipts in full has long been the settled law of this state, whatever it may be elsewhere. The receipt in this case, unless im-

peached for fraud or mistake, was valid and discharged the whole debt though given for a payment that was in itself but a part of the entire debt, and, while the receipt, if obtained of the plaintiff by fraud, would be of no validity as against him, yet where it was given, as the jury must have found it to have been, as a part of a scheme for enabling the defendant to defraud his other creditors, it is clearly well settled law that the plaintiff cannot avail himself of that very fraud to set the receipt aside. No principle is better settled than that a man can never set up his own fraud for his own benefit."

III.

The holding of the Referee below was that, notwithstanding the fraudulent character of the transfer to the Summit Investment Company, still, the property being now in the possession of the Trustee in Bankruptcy, it was not equitable that he should hold the property and that the notes, in payment of which the property was transferred, should be considered paid. The District Judge also held that the transaction between the Wenatchee Heights Orchard Company and the Summit Investment Company was a scheme to hinder, delay and defraud creditors; that it was not only fraudulent in law, but that it was also fraudulent in fact, and that the fraud was by Wells and McPherson; so much so, that he considered some punishment neces-

sary, and for that reason held that, as to the property transferred, Wells should not receive any dividends until all other creditors were paid in full. Our contention is that, the notes having been paid, they were paid absolutely and finally; that the fact that the Trustee later managed to recover this property from others could in no wise inure to the benefit of those who were guilty of the fraudulent scheme.

The question as to whether or not a grantee in a conveyance to hinder, delay or defraud creditors, who is himself a party to the fraud and an active participant therein, can recover the consideration when he returns the property, or can, as a condition of its return, insist that he be repaid the consideration, is not a new one. The rule was laid down very clearly by Mr. Justice Bradley in *Railroad Company vs. Soutter*, ~~2~~ Wall. 517-523:

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“The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who through their trustees and agents effected the sale that was declared fraudulent and void as against creditors and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could

recover for its repairs, or improvements, or encumbrances lifted by him whilst in possession? If such a case can be found in the books we have not been referred to it. Whatever a man does to benefit an estate under such circumstances he does in his own wrong. He cannot get relief by coming into a court of equity. By the civil law the possessor even in bad faith may have the value of his improvements, if the real owner chooses to take them. The latter has the option to take them or require their removal; but this rule has never obtained in common law nor in the system of English equity. One of the maxims of the latter system is, 'He that hath committed iniquity shall not have equity,' and various illustrations of it are furnished by the books."

The Circuit Court of Appeals of the Eighth Circuit had a somewhat similar situation before it in the case of *Burt vs. C. Gotzian & Co.*, 102 Fed. 937. In that case the lower court had set aside an assignment of a sheriff's certificate of sale and had refused to the grantee a return of the purchase price or of the money expended in the payment of taxes and encumbrances. In affirming the judgment the court said:

"She knowingly took this assignment to defraud those creditors. If she had paid the purchase price for it, and if she had paid six thousand dollars on account of taxes and encumbrances upon the land, she would not be entitled to any allowance for or reimbursement of these sums as against the creditors repre-

sented by the appeal. One who knowingly takes a conveyance or assignment to aid and abet a scheme to defraud creditors cannot hold the fraudulent instrument, or any interest under it, as against the creditors, to secure the amount paid for it, or for the satisfaction of taxes or encumbrances he has paid upon the property it affects.

“*Sands vs. Codwise*, 4 Johns, 98.

“*Railroad Co. vs. Soutter*, 13 Wall. 517-523.

“*Thomas vs. Bickford*, 19 Minn. 17.

“*Roller Mills vs. Ward* (Minn.), 70 N. W. 271.

“*Davis vs. Leopold*, 87 N. Y. 620-22.

“*Swineford vs. Rogers*, 23 Cal. 324.”

Another case growing out of the same failure was before the same court in *Lynch vs. Burt*, 132 Fed. 417. In that case the opinion was written by Mr. Justice Van Devanter, now of the Supreme Court of the United States, and in the course of it he says:

“This principle has a recognized application in suits by creditors to avoid or quiet title against fraudulent conveyances or transfers of a debtor's property, where, after a conveyance or transfer, taxes are paid or encumbrances discharged under circumstances which give rise to an equity equal or superior to that of creditors. If the grantee has been a conscious participant in the fraud he is not, as against creditors, entitled to reimbursement for such expenditures.

“*Burt vs. Gotzian & Co.*, 102 Fed. 937.

“*Guckenheimer vs. Angerine*, 81 N. Y. 394.

“Public policy forbids the reimbursement of a *particeps criminis*; otherwise one would hazard nothing by active participation in such unfair dealing.”

In this case, if we apply the doctrine of the court below that, notwithstanding this fraudulent conveyance, and notwithstanding that Wells and McPherson had stripped the bankrupt corporation of nine-tenths of its assets, with the deliberate intention to hinder, delay and defraud creditors, they may now, after the proceeds have been taken from them in legal proceedings, be placed back in the same position as they would have been had they not attempted the fraud, then the bankruptcy act extends an invitation to all who are inclined to fraudulent dealing with their creditors to do so. Nothing whatever is hazarded. A debtor and his dishonest creditor may enter into a fraudulent scheme by which all the property of the debtor is transferred in pretended payment of the indebtedness to the one creditor, with the intention on the part of both debtor and creditor to hinder, delay and defraud creditors. If the scheme is successful, they have the property. If the scheme is not successful and the other creditors, after litigation, are enabled to recover the property, then the creditor who has participated in and been a party to the fraud may still prove his indebtedness.

The Supreme Court of Oregon has expressed itself quite forcibly as to this situation in the case of *Sabin vs. Anderson*, 40 Pac. 870. In that case the debtor was the owner of a large number of accounts. In order to hinder and defraud his creditors he assigned them to the bank. The bank gave him a certificate of deposit for the amount of the accounts, but it was understood orally that the certificate should not be negotiated except upon an explanation that the real agreement between the bank and the debtor was that the certificate of deposit was only to be paid out of the proceeds of the accounts. The bank became alarmed lest the debtor should convey the certificate without the explanation and, as a result, paid to the debtor finally, in order to prevent this happening, about \$2,800 and became the absolute owner of the accounts as against him. When a suit was started to set aside the assignment of the accounts to the bank and to compel it to account for the moneys it had received on the accounts, the bank claimed reimbursement of this amount which it had paid Anderson, and the Supreme Court, speaking through Judge Wolverton, said:

“But Lively and Bently (the bank) contend that, in any event, they ought to have

credit in the account for the \$2,800 which they paid to Anderson for the recovery of the outstanding certificates issued by the bank. The functions of a creditor's bill are to pursue a fund, or to restore a right lost by law, and not to visit the fraudulent grantee with damages. If a person had property of which he has obtained possession for the purpose to defraud the creditors of another, he is under no legal obligation to turn it over to such creditors, but, if he is honest, he will restore it to him to whom it belongs that it may be applied in satisfaction of their demands, if wanted. Now, we presume that if such person has honestly parted with what he fraudulently received, before the rights of the creditors are fixed by judgment, and the filing of the bill, he ought to be exonerated from further liability. *Swift vs. Holdridge*, 10 Ohio, 231. But that is not what Lively and Bently have done in this instance. What they did was the result of their solicitude to protect themselves against the acts of Anderson, and not to restore property held by them in fraud of creditors. *How vs. Camp*, Walk. Ch. 427, is a case similar in principle, where lands had been conveyed in fraud of creditors and the fraudulent grantee had disposed of a portion of them to bona fide purchasers and paid a portion of the purchase money over to the fraudulent grantor. In taking the account the court refused to allow credit for the money thus paid over, and, discussing the case, the chancellor says: 'This is not a case of constructive but positive fraud against creditors, in which the grantee is *particeps criminis*. When that is the case, the rule is not to allow the grantee, in taking the account, for any advancement made to the grantor, as it would to the extent of such allowance, be

giving effect to the fraud, and remove the chief obstacle to third persons assisting debtors in defrauding their creditors, by indemnifying them against pecuniary loss in case of detection.' Spencer, J., in *Sands vs. Codruse*, 4 Johns, 599, says: 'It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. No right can be deduced from an act founded in actual fraud.' This court, in the exercise of equitable jurisdiction, cannot take an account between the parties to the fraud for the purpose of reimbursing the fraudulent assignees for any money they may have expended for the sole protection of themselves without regard to the right of the creditors."

In the case of *In re Freidman*, 164 Fed. 131, claims were presented against an estate by parties whom the court held, in the opinion, had assisted the bankrupt in the scheme and device to cheat and defraud his creditors. After finding that the scheme and conspiracy existed, Judge Quarles says, at page 143:

"It is urged, however, with great confidence, that, inasmuch as the evidence shows that the several sums of money represented by the notes were, in fact, advanced to the bankrupt, therefore, these claims must be allowed. It would be a new doctrine, indeed, if a court of equity were called upon to hand back conspirators money which they have embarked in a fraudulent scheme, and by means of which the fraudulent purpose has been effectuated. It has been repeatedly held that,

where a fraudulent conveyance is set aside by a court of equity, no accounting is to be taken of the money which the fraudulent grantee has actually invested to secure the fraudulent conveyance. This contention is disposed of by the following authorities: *Ferguson vs. Hillman*, 55 Wis. 181-190, 12 N. W. 389, is a leading case where a large number of authorities to the same effect are collated and cited in the opinion. This opinion was adhered to in: *Bank of Commerce vs. Fowler*, 93 Wis. 241-45, 67 N. W. 423. See, also, *In re Flick* (D. C.), 105 Fed. 503. *Burt vs. Gotzian*, 102 Fed. 937; *Lynch vs. Burt*, 132 Fed. 417, both of which were decisions of the Circuit Court of Appeals of the Eighth Circuit. The theory of these cases is that, when a creditor participates in a scheme to defraud other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and a court of equity will not practically pay a bonus upon the fraud by returning such an advance or expense."

In the case of *Ferguson vs. Hillman*, 12 N. W. 389, one of the leading cases on the subject of fraudulent conveyances, the court says:

"The rule of law is well established by the courts that a grantee of real or personal estate, when it is shown that the conveyance was made with intent to defraud or to hinder and delay creditors, has no equity as against such creditors to be protected for the amount which he has actually paid out on such purchase. The reason and justice of this rule are apparent when we consider the effect of any different rule upon the rights of the creditors. If the

fraudulent grantee can be protected for the amount actually paid by him at the time of the fraudulent transfer, then this would happen; the fraudulent debtor would make the sale to avoid the payment of his debts, take the money and leave the country, and the purchaser have knowledge that he intended so to do, and yet be protected for the money so paid, by courts. The rule, as before stated, has been recognized and adopted by this as well as other courts."

In the case of *Kurtz vs. Lewis Voight & Sons Co.*, 75 S. W. 386, an insolvent debtor had sold a portion of his stock. The purchaser gave a chattel mortgage, the purchase being evidenced also by notes. They were then endorsed without recourse by the debtor to his brother. It was admitted that while the sale was made with the intent to hinder, delay and defraud creditors, and while the purchaser had knowledge of the fraud and *particeps criminis*, still, the brother to whom the consideration was paid was innocent and was, also, a *bona fide* creditor of the debtor. The court, nevertheless, refused to allow credit for the amount of these notes. The court says, at page 387:

"Such a transaction was necessarily voidable at the instance of the creditors, irrespective of the payment by the buyer of the full value of the goods, and also irrespective of the fact that the vendor assigned the notes which he received for the price of the goods to the holder of a valid demand against himself. As to the

latter party, it is true that he could not be compelled to account to other creditors as trustee for their benefit, except upon proofs of participating in the fraud of the vendor of the goods, but this exemption on his part does not extend to the other two parties, the buyer and the seller of the goods. As to the seller, fraud sufficient to sustain an attachment of his property was shown when proof was made of his intent to fraudulently dispose of any part thereof. *Bank vs. Lumber Co.*, 59 Mo. Appls. 317. *Bank vs. Powers*, 144 Mo. Appls. 447. *Bank vs. Russey*, 74 Mo. Appls. 651. *Glacier vs. Walker*, 69 Mo. Appls. 288. Now, when this intention was communicated to a stranger, who at once intentionally aided and assisted in its consummation, did he not thereby necessarily subject the property so taken to the same processes to which it would have been exposed if it had been found still in the hands of the fraudulent vendor? In other words, how did the vendee acquire any higher rights to the property than the fraudulent vendor, if both cherished the same fraudulent purpose in the transfer of the title? The only answer to these questions is that the property was equally open to a suit of the creditor, whether in the hands of a fraudulent vendor or fraudulent vendee."

The rule as to a fraudulent conveyance made with the actual intent to hinder, delay and defraud creditors has been very well stated in 2 *Moore on Fraudulent Conveyances*, page 694, where the author says:

"Where a conveyance has been made with

the actual intent to defraud creditors and is fraudulent in fact, it will not be upheld as against creditors even to the extent of the consideration actually paid by the grantee. It is wholly void *ab initio* and would not stand to any extent as security or indemnity. The grantee, as a general rule, is regarded as *particeps criminis*, or a guilty participant in the fraud and is not entitled to reimbursement, either for purchase money or consideration, or for indebtedness paid, or for liabilities incurred on account of it."

A large number of cases, covering almost all of the States, are cited by the author in support of the text.

In *Bump on Fraudulent Conveyances*, 4th Edition, page 445, it is forcibly stated that:

"There is no obligation upon anyone to extricate a rogue from his own toils on any other principle. The knave might gain, and could not lose by a dishonest expedient and inducements would be furnished to unfair dealing if the law were to repair the accidents of an unsuccessful trick. A fraudulent creditor, therefore, is allowed to retain the property, not for any merit of his own, but for the demerit of his confederate, in accordance with a wise and liberal policy which requires that the consequences of a fraudulent experiment may be made as disastrous as possible. The law endeavors to environ a debtor with all possible perils to make it appear that honesty is the best policy."

To the same effect was *Scwell vs. Norris*, 58 S. E. 637, 13 L. R. A. (N. S.) 1118; *Burke vs. Koch* (Cal.), 17 Pac. 228; *Biggins vs. Lambert* (Ill.), 73 N. E. 371.

The statement from Bump, quoted above, seems to us to fully answer the contention of Wells in this case, "that there is no obligation upon anyone to extricate a rogue from his own toils." No one is responsible for the record made on the minute books of the Wenatchee Heights Orchard Company, showing that the note now in question was fully paid, except Wells himself. His sole object in making that record was, as he himself said, to make it appear to other creditors of the Wenatchee Heights Orchard Company that it had no property whatsoever out of which they could satisfy their demands. As he himself says:

*"We were afraid that possibly there might have been—might be others who would be encouraged by that fact that Mr. Hotchkin had obtained a judgment and would enter suits and thus dissipate the resources of the Wenatchee Heights Orchard Company in a way that we thought was not just. * * *"*

Q. And you were trying to put those assets into such shape so that anybody who secured a judgment for the reasons that Hotchkins did would be unable to touch that property, is not that true?

A. No; that was not my idea exactly. *My idea was to put the matter in such shape as to discourage persons who thought of entering suits for causes of that kind.*" (Record, pp. 90-92.)

When discovered, there was not even a pretense made that there was any honest motive whatever for the transfer of the property. There was only one idea in the minds of Wells, McPherson and Gates at the time they made this transfer—that idea was solely the one of putting the assets of the Wenatchee Heights Orchard Company beyond the reach of any creditors. No idea of preference to themselves ever entered their minds. It was a pure case of a transfer with the intent to hinder, delay and defraud creditors.

In a brief filed before the District Court, counsel for Wells relied upon the case of *United States Rubber Co. vs. American Oak Leather Co.*, 181 U. S. 434, and *Hutchinson vs. Otis, Wilcox & Co.*, 190 U. S. 552, to sustain their proposition that, notwithstanding the fraudulent character of the transfer, nevertheless they were entitled, the property having been recovered, to prove their claim.

In the *U. S. Rubber Co. vs. American Oak Leather Co.* it will be seen upon reading the opinion that the whole case turned on the question

as to whether or not there had been actual fraud, as distinguished from constructive fraud. The Circuit Court of Appeals in the same case (96 Fed. 891) had held that the facts constituted a fraud in fact and had denied to those creditors who participated any right to share in the fund until all others were fully paid. It is true that this was reversed by the Supreme Court, but it was reversed solely upon the ground that that court held there was no fraud in fact, but that the fraud was purely constructive or fraud in law. In addition, the Supreme Court pointed out that possibly in bankruptcy proceedings the result reached by the Circuit Court of Appeals might be the proper one, saying, at page 450:

“The theory of the Court of Appeals, as forcibly expressed in the opinion of Circuit Judge Woods, would seem to be the application to the facts of the case of the principles of the bankrupt law with its feature of forbidding preference. In any event, the decision is based wholly upon the ground that the Supreme Court differs with the Circuit Court of Appeals in its determination that the facts as found constitute a fraud in fact.”

The case of *Hutchinson vs. Otis, Wilcox & Co.* was a case in which the sole question was one of preference, without any claim that the facts constituted a fraud.

In the light of all the cases and authorities, and in view of the finding of the court and of the referee who saw and heard the witnesses on the stand that the facts constituted a fraud in fact, it seems to us there is no escape from the conclusion that those who participated therein and who were the instigators of the fraud should not now be permitted to escape the consequences of their own wrongdoings. Any other result permits them to gamble upon the question as to whether a court of equity will discover them in their fraud and so gamble without the slightest chance of loss and with a fair chance of gain.

IV.

There is one additional obstacle to the allowance of these claims. The whole basis, as we have said, on which counsel for Wells, the Referee and the Court below have ever claimed that Wells was entitled to share in the estate at all is on the ground that the property has come back to the estate. Now, if there is one proposition of law that is well settled in the bankruptcy law, it is that the status of a claim depends absolutely upon its condition at the date of the filing of the petition. (Bankruptcy Act, Sec. 63.)

Nothing that happens since that date can in any wise affect the validity of the claim or its provability. The record in this case, made by Wells himself, shows that the property was not returned by the Summit Investment Company until after the filing of the petition, the adjudication, and the appointment of a trustee. This is shown by the stipulation set forth at the bottom of page 96 of the printed record. In other words, on the date of the filing of the petition, and on the date of the adjudication, the Summit Investment Company had not returned this property. It was still in the name of the fraudulent grantee.

While it is unusual to cite as authority a brief submitted by counsel, we feel, in justice to ourselves, that we should cite the following from the brief submitted by the present attorneys for this same claimant in another question arising in this same bankruptcy:

“That is to say, if any claim against this estate is contingent upon what the trustee may now do or not do, that very fact will render that claim not provable against the estate, for it is the decision of all the late cases that in bankruptcy a claim must turn on its status at the time of the filing of the petition, and no claim contingent upon any subsequent events whatever can be proven.

- “Colman vs. Withoft*, 195 Fed. 250 (C. C. A. 9th Cir.).
- “In re American Vacuum Cleaner Co.*, 192 Fed. 939.
- “In re Inman & Co.*, 171 Fed. 185 (D. C.), cited with approval *In re Merrill & Baker*, 186 Fed. 312 (C. C. A. 2nd Cir.).
- “In re Imperial Brewing Co.*, 143 Fed. 579 (D. C.).
- “In re Roth & Appel*, 181 Fed. 667 (C. C. A. 2nd Cir.).
- “Slocum vs. Soliday*, 183 Fed. 410 (C. C. A. 1st Cir.).
- “In re Gallacher Coal Co.*, 205 Fed. 183 (D. C.).
- “In re Abrams*, 200 Fed. 1005 (D. C.).
- “Watson vs. Merrill*, 136 Fed. 359 (C. C. A. 8th Cir.).”

V.

One other ground of objection to the allowance of these claims appears to us to be quite persuasive. Wells now claims that his ownership of the note was distinct from the Summit Investment Company, or Gates; practically, that they had nothing to do with each other and that his record that the property was transferred to the Summit Investment Company in payment of the note was wholly false. Now, if this is true, how can a reconveyance

by the Summit Investment Company inure at all to the benefit of Wells? The only theory upon which he can insist that he should be allowed to have his claim approved is that *he* has returned the property to the trustee. If he and the Summit Investment Company, or Gates, are distinct individuals, and if the Summit Investment Company, or Gates, did not own his note, and his ownership was not for their benefit, why is he entitled to any special consideration because a corporation in which he has no interest and which he does not control, seeks to return property which he fraudulently conveyed to it?

It has been a recognized maxim of equity ever since courts of equity were established that no man can set up his own wrong. If Wells is to be permitted to prove his claim in this case, that maxim is reversed and set aside. When this claim comes on for proof the situation is very simple. Wells files a claim on a note, setting the note up. The Trustee objects that it has been paid. When testimony is to be taken on that question the Trustee offers in support of his allegation the record of the corporation made by Wells himself, showing that property was transferred in payment of the note which Wells then set up he had transferred. To

rebut that evidence, Wells is compelled to set up the claim that this record is a fraud and a falsehood, that the conveyance was made to hinder, delay and defraud creditors and is, therefore, invalid; that each and every transaction set up in these minutes which he made is false and fraudulent and void, and because it is false and fraudulent and void and because he participated in and assisted in making it he therefore should be permitted to recover on his notes. It seems to us that the mere statement of the position is enough to prove its falsity. It seems so to the Supreme Court of Connecticut in *Aborn vs. Rathbone, supra*.

It is respectfully submitted that the order of the District Court should be reversed and the case remanded to that Court with instructions to enter an order disallowing the claim of L. V. Wells in its entirety.

RAYMOND D. OGDEN and
WALTER SCHAFFNER,

*Attorneys for J. B. Lincoln,
Trustee, Etc., Appellant.*

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**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

L. V. WELLS,

Appellant,

vs.

J. B. LINCOLN, as Trustee in Bankruptcy of the
Estate of WENATCHEE HEIGHTS OR-
CHARD COMPANY, a Corporation, Bank-
rupt,

Appellee,

and

J. B. LINCOLN, as Trustee in Bankruptcy of the
Estate of the WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt,

Appellant,

vs.

L. V. WELLS,

Appellee,

In the Matter of WENATCHEE HEIGHTS
ORCHARD COMPANY, a Corporation,
Bankrupt.

Brief of Appellee L. V. WELLS, upon Appeal of
J. B. Lincoln.

**Appeal from the United States District Court
for the Western District of Washington
Northern Division.**

The chief exception which we take to the trustee's brief is that counsel for the trustee persist in arguing the law of this case upon the theory that

the claimant is a rascal, and thereupon make their statements of fact to fit that theory, regardless of whether or not those statements are borne out by the record.

Taking a general view of the entire case we would call attention to the fact, as we have mentioned in the appellant's brief upon the claimant's appeal, that Judge Hoyt, who has had many years of experience as a referee in bankruptcy in a district where there has been much business arising from bankruptcies, both fraudulent and honest, had both the claimant and his co-officer McPherson before him personally on various occasions and they were separately submitted to rigid examinations. The trustee had every opportunity to show the falsity of any statements made by the officers of the bankrupt and to unearth fraud if there had been any, and yet Judge Hoyt in his order does not find that this claimant had been guilty of any actual fraud or of any intent to defraud any one, or that any creditor of the bankrupt had ever been hindered, delayed or defrauded.

In this connection we will point out at this time a few of the statements contained in the trustee's brief which are not borne out by the record

and some of which are directly in conflict with the record.

Upon page 7 of the brief of the trustee as appellant, appears the statement that the finding of the Public Service Commission of the state was that the corporation had "at no time" furnished the amount of water it had contracted to furnish. The wording of the record (trans. p. 101) is that the finding was that the bankrupt "had not furnished the water called for by its contracts," which is a very different statement.

At the foot of page 13 of the trustee's brief appears the statement that McPherson testified that he had about a one-quarter interest. What McPherson did testify to was that he had a one-fourth or a one-third interest in the Walker property consisting of one hundred and sixty acres and the Wheeler property consisting of three hundred and twenty acres, and that he had no interest in the rest of the property. (Trans. pp. 70 and 71.)

Again, at the top of page 14 of the trustee's brief appears the statement that "A. C. McPherson had approximately a one-eighth interest and he received \$7,500." What the record shows is that A. C. McPherson had a one-half interest in 120 acres (i. e., a one-half interest in one-tenth of the

entire tract) and he received for it \$2,000 in cash and a note for \$7,500. (Trans. p. 80.)

Upon page 16 of the trustee's brief appears the statement that "it has been judicially and conclusively determined that they never had two acre feet of water per acre per year, and never could deliver it." There has never been any such judicial determination. The substance of the determination of the Public Service Commission of the State of Washington is set out upon page 101 of the transcript, from which it appears that the Public Service Commission found that the bankrupt had not furnished the water called for by its contracts, and required it to furnish plans for increasing its water supply. Thereupon the bankrupt furnished a plan which the Public Service Commission approved, and the estimate of the engineer of the trustee was that the construction of the improvement according to this plan would cost the bankrupt \$8,000. The only presumption one can draw from this is that the putting in of this improvement at the estimated cost of \$8,000 would enable the bankrupt to comply fully with its contracts.

Upon page 18 of the trustee's brief appears the statement that the Wenatchee Heights Orchard Company, in its ledger which was offered in evi-

dence, "entered the value of the real estate purchased by the corporation from Wells at \$92,800." No such entry was made. There is an entry upon the ledger of real estate at \$92,800, but whether this is gross value of the real estate itself or of the company's equity in it, or what the company had actually paid out for real estate, does not appear and the trustee's bookkeeping expert testified that these figures might mean any of these things. If the trustee's counsel want to interpolate this ledger entry in the record, we would ask that they also interpolate the entire testimony of their expert witness P. T. Bliss.

At the top of page 23 appears the statement that Wells testified that when the corporation was formed "he and his partners made up a written statement of their account which showed the value they placed upon each separate piece of property." What Mr. Wells testified to is shown upon page 80 of the transcript wherein it appears that he made figures on "pieces of paper," and the witness did not know whether they were yet in existence or not. In other words, they scribbled on various scraps of paper until they arrived at a satisfactory settlement. This is neither a written statement nor a memorandum as it is called in the trustee's brief.

At the top of page 25 of trustee's brief appears the statement that Gates in his proposal valued the property of the corporation at \$108,000. He did no such thing. His proposal appears upon page 83 of the transcript, and from that it appears that he stated the total value of this property to be \$75,000, subject to a mortgage of \$33,500.

Upon page 39 of the trustee's brief appears the statement that Wells' sole object in making the record in the minute book of the Wenatchee Heights Orchard Company was to make it appear to other creditors that it had no property whatsoever out of which they could satisfy their demands. Counsel then pretend to give a quotation from the claimant's testimony, but omit the essential feature of it and that is "if others who had not proper claims against the company were able to recover on judgments, necessarily the assets of the Wenatchee Heights Orchard Company would have been dissipated before we could carry out our contracts; and it was my idea to surround these resources by such safeguards as would prevent their being dissipated in that manner, and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land."

At the top of page 43 appears the statement that "the record in this case made by Wells himself shows that the property was not returned by the Summit Investment Company until after the filing of the petition, the adjudication and the appointment of a trustee." The record actually shows that this property physically never left the possession of the Wenatchee Heights Orchard Company, as they continued to collect the rents from the property after the conveyance to the Summit Investment Company as well as before. (Trans. p. 97.) All that the Summit Investment Company ever had was a bare legal title and, at the time of the petition in bankruptcy there was outstanding the agreement of December 30, 1912, reciting that all this property was in fact the property, assets and effects of the Wenatchee Heights Orchard Company. Under the Bankruptcy Act the trustee took the legal title to this property upon his appointment just as surely as if that title had been standing in the name of the bankrupt all the time.

I.

THE VALUE OF THE PROPERTY TURNED INTO THE COMPANY.

Upon this subject the referee made the find-

ing that "the transfer of certain property to the Wenatchee Heights Orchard Company by said L. V. Wells on the 9th day of March, 1907, was a valid contract and conveyance and for a fair consideration." (Trans. p. 24.) This finding is approved by the district judge, and in view of the fact that there is absolutely no evidence that this was an inflated value, other than the fact that this property had been purchased several years before (upon a rapidly rising market) at a less price, we think that even if this court should examine this evidence *de novo*, it would come to the same conclusion. The claimant in his testimony (trans. p. 81) taken in June, nearly three months prior to the hearing upon his claim, gives the names and addresses of various persons who had appraised this property. It would have been a very easy matter for the trustee to have produced evidence as to what was the actual market value of that property at the time it was turned over to the corporation, and yet the trustee made no attempt to produce any such evidence. We think that the rule of evidence which the trustee's counsel seeks to apply in their second point (p. 11) would be very applicable against the trustee upon this phase of the question, and the fact that the trustee produced absolutely no direct testimony whatever

as to the value of this property at the time it was turned over to the corporation is cogent proof that the value at which it was turned over to the corporation was, as the referee found, a fair valuation.

The trustee himself testified (trans. p. 97) that the value of the tillable land which could be irrigated from the ditches of the bankrupt, "would be increased about \$400 per acre if properly irrigated." In order to properly irrigate this land according to plans which had been approved by the Public Service Commission, it would cost the estate from \$5,000 to \$8,000. (Trans. p. 101.) In other words, according to the trustee's own estimate an expenditure of from \$5,000 to \$8,000 would make the tillable land, of which there was at least 600 acres, worth at least \$400 per acre.

Counsel for the trustee attempt to prove by the settlement made with Steward and A. C. McPherson, that the parties at that time considered the property worth but \$60,000 or \$70,000. The trouble with their proof is that they start with incorrect facts. The facts as set forth by the record are as follows:

"(Testimony of L. V. Wells.)

The witness further testified that A. C. McPherson received about \$2,000 in cash and a note for

\$7,500 as payment in full for his investment; that his investment consisted of a half interest in the Cole 40 acres and a half interest in 80 acres in section 34; that Steward got about \$2,000 in cash and a note for \$8,890 for his interest; that his interest was scattered around through several pieces of property; that when they organized the company they estimated the value of the property to be \$200,000; that he did not recall the values placed upon the various tracts; it was his recollection that Mr. Steward's interest was larger than that of Mr. E. H. McPherson, but that Mr. E. H. McPherson received his interest in the corporation and his note as 'a result of some other deals Mr. McPherson and I had personally.' " (Trans. p. 80.)

From this it will be seen that A. C. McPherson received about \$2,000 in cash and a note for \$7,500 for an undivided one-half interest in 120 acres (one-tenth of the total acreage) which was subject along with the rest to a blanket mortgage of \$50,000. The fact that Steward and A. C. McPherson accepted the unsecured notes of the company showed that they must have thought that the value of the company's assets was considerably in excess of its liabilities.

Upon page 17 of the trustee's brief, appears a weird method of computation by which counsel for the trustee come to the conclusion that this property with the water called for under the contracts was worth about \$95,000. We would merely call attention

to the fact that counsel arrive at this conclusion by deducting one sum of \$85,000 for the reason that "it is well known that land sold in small tracts brings approximately twenty-five per cent more, at the very least, than land sold in blocks of twelve hundred acres." Inasmuch as there is no evidence whatever as to this interesting fact of expert knowledge, we suppose that counsel expect this court either to take judicial notice of this principle of estimating real estate values or to take their unsworn statements as expert testimony. We fail, however, to see its application in this case inasmuch as this land was valued upon a basis of being capable of division and sale in small tracts.

Taking a proper method of computing the value of this property as it appeared at the time of the organization of the company, the selling price was \$340,000; from that, deduct 15 per cent for commissions (which the promoters expected at that time to pay), and \$60,000 for the planting, caring for and developing of the 600 acres at the estimated cost of \$100 per acre (trans. p. 82), and \$10,000 for putting the additional water upon the land, and we have \$219,000 as the net value of the land as it appeared at the time of the organization of the company. The promoters put it in at a price of

over \$30,000 less than that, which leaves what would be considered an ample margin for contingencies. It is true that the contingencies have been more than \$30,000, and the cost of caring for the land has been more than \$100 per acre, but if the honesty of a business venture is to be judged by assuming that the promoters at the outset foresaw the outcome, an honest bankruptcy would be a paradox.

In all of the cases cited by the trustee upon this point, it appears that the property was turned over to the corporation at values which were grossly in excess of any honest valuation. The law of the case applicable to a state of facts where the promoters of a corporation turned in property at what was then by a fair estimation its actual market value, but which later depreciated in value, is that the valuation put upon it by the promoters must stand even though the property afterwards proved to be of much less value than was supposed.

Turner vs. Bailey, 12 Wash. 634.

Kroenert vs. Johnston, 19 Wash. 96.

Beddow vs. Huston, 65 Wash. 585.

In re Alleman Hdwe. Co., 181 Fed. 810.

Coit vs. Gold Amalgamating Co., 119 U. S. 343.

In *Coit vs. Gold Amalgamating Co.*, 119 U. S.

343, the promoters of the corporation turned in in payment of its \$100,000 capital stock, as appears from the decision, "a machine for crushing ores, the right to use a patent called the Crosby process and the charter of the proposed organization".

Further quoting from the opinion:

"Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of \$100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property; and the average estimate amounted to \$137,500. This sum they reduced to \$100,000, inasmuch as the capital stock was to be of that amount."

The court held that, in the absence of actual fraud, a mere overvaluation would not render such a deal void as against creditors, saying:

"If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money, in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there

is still a debt due to the corporation, which, if it becomes insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received there must be actual fraud in the transaction, to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud."

Probably the last word in the Federal reports upon this question is the case of *In re Alleman Hardware Co.*, 181 Fed. 810, from the Circuit Court of Appeals of the Third Circuit. The facts in that case are more fully set out in the decision of the District Court, found in 172 Fed. 611. In this case the creditor H. N. Gitt, who was seeking to prove a claim was, at the time of the adjudication of bankruptcy, the sole owner of the capital stock of the bankrupt. He, with one Johns had, prior to the organization of the bankrupt, been partners in the hardware business. At the time of the organization of the company Johns offered Gitt \$10,000 for the privilege of getting out of the company and being relieved from liability and this was agreed to, Johns promising to remain and assist in the organization of the new company.

At the organization of the company Johns and Gitt transferred the property and business of the

former partnership to the company for \$5,000 and \$20,000 common stock of the company, the company to assume all the partnership liabilities which, at that time, amounted to \$64,000. In order to make a balanced statement of assets and liabilities it was necessary to put in good will as an asset at \$16,000 and leave out contingent claims amounting to \$11,000, of which \$5,000 later had to be paid. The company, however, did business for several years and then went into bankruptcy, with H. N. Gitt its then sole owner, being a creditor for over \$21,000.

The District Court refused to allow this claim but the Circuit Court of Appeals reversed the District Court, saying:

“Now, granting that subsequent events show the partnership was then insolvent, we then have the question, How was any party now before us affected thereby, or how could that issue be involved in this distribution? This company came into existence, and its whole corporate business was based on the stock of goods it obtained from this firm. Its whole business existence and the assets here distributed are founded on the affirmance, ratification and enjoyment of the contract for the sale of the property of Gitt and Johns to the corporation. It sold these goods and mixed the proceeds up in its operations, and the present fund had its origin in property of the old firm. How does it lie in the mouth of the company to at the same time enjoy the property it received and allege the illegality of its

reception? We are not here dealing with a fraud, we are not dealing with a subscription to stock, we are not dealing with the rights of any creditor who was misled; but we are dealing with a case where no party who might have been injured thereby is concerned, where all the creditors of the old firm have been paid, and where there is no proof that any creditor of the new corporation has been deceived or misled by the stock issue complained of. If, then, the rights of no individual creditor are here involved or sought to be enforced, it follows that Gitt's claim cannot be rejected unless the bankrupt company itself has a counterclaim against him. And how can it be said it has? It is true capital stock is a trust fund for the benefit of creditors, and, if stock is fictitiously and fraudulently issued, it may be collected for the benefit of creditors (*Coit vs. Gold Co.*, [C. C.] 14 Fed. 16; *Handley vs. Stutz*, 139 U. S. 436, 11 Sup. Ct. 530, 35 L. Ed. 227); but when, as here, the value of the consideration of the stock was fairly debatable, and the corporation enjoyed, used, and did its entire corporate business for several years on the property conveyed to it, and where the property cannot be restored or the contract rescinded, and where no person here interested was in any way induced to act or was misled or wronged by the maintenance of that *status*, we think the corporation has no such right or claim against Gitt as prevents his unquestioned debt from participating in this distribution. Under these facts, it is clear that this corporation had, prior to bankruptcy, no right of action against Gitt to recover on this stock which was issued to him for his merchandise. And, if such be the case, the *status* of the parties is not changed by bankruptcy, for, as was said in *Thompson vs. Fairbanks*, *supra*:

“Under the present bankrupt act, the

trustee takes the property of the bankrupt, in case unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in the hands of the bankrupt.' "

In re Alleman Hdwe. Co., 181 Fed. 810, 813-814.

Counsel for the trustee make much of the fact that both Wells and McPherson stated in their testimony that at the time when the final settlement among the four men was made, there was considerable accounting and computing done on "pieces of paper", and that the claimant has not produced these pieces of paper. If the trustee wanted these pieces of paper produced he could have obtained them or found out whether they were in existence by means of a subpoena *duces tecum*. All that this point amounts to is that in the course of a long cross-examination it developed that some six years prior to this time the parties to a settlement had made various computations upon "pieces of paper". The witnesses were not called to produce them and nothing more was thought of it at the time. Now trustee's counsel argue that this is positive proof of a conspiracy even intimating (p. 15) that claimant's counsel suppressed these documents. Counsel for the trustee should know that Wells might have made

as many statements as he pleased in 1906 that this property was worth \$200,000, and none of those statements would have been admissible on his own behalf as they would have been nothing but self-serving declarations. The only way they could properly have been introduced would have been through the trustee requiring their production as cross-examination.

In the last case cited by the trustee upon this point, *Graves vs. United States*, 150 U. S. 118, it was expressly held that it was reversible error for the United States attorney to call attention to the fact that the defendant had not produced his wife as a witness, in view of the principle of law that the wife was not admissible as a witness in favor of her husband, and therefore the husband could not have had the benefit of his wife's testimony.

II.

TRUSTEE'S CLAIM OF ESTOPPEL.

Counsel for the trustee claim that Wells is estopped to claim that he did not transfer the note for \$57,000 to Gates. In support of this principle of law counsel cite one case—*Aborn vs. Rathbone*, 8 Atl. 677, from Connecticut, decided in 1886, where

the facts of the case were that the person who presented the receipt was claiming an actual settlement of the claim, and it was admitted that he had paid a consideration for the receipt. It was under this state of fact that the court used the language set forth on pages 26 and 27 of the trustee's brief.

Against this lone case we would place the case of *Thompson vs. Sioux Falls National Bank*, 150 U. S. 231, where the defendant bank had without consideration given to a defaulting county treasurer a cashier's check so that the treasurer could show it to the county commissioners in his settlement. Suit was brought upon the check and the claim was made that the bank, by giving the check for a fraudulent purpose was thereby estopped to deny its liability, but Mr. Justice Brown in his opinion said (p. 244):

"The claim that defendant was estopped by its cheque to deny that the bank was indebted to the county in the amount of such cheque, depends practically upon the same considerations as the question of innocent purchasers. If, upon the faith of such representations, the county commissioners did any act prejudicial to the interests of the county, an estoppel might arise; but if, before such act was done, the commissioners were informed that the cheque was fictitious, they could not be said to have acted upon the faith of its representation and there could be no estoppel."

The absolutely necessary element of an equitable estoppel is that the person against whom the estoppel is claimed must have performed some act or made some statement which has induced the person claiming the estoppel to believe or act to his prejudice to such an extent that it would now be inequitable to permit the person claimed to be estopped to speak the truth. There is absolutely no evidence in this case that any creditor of this estate ever saw the minutes of the bankrupt corporation, or knew of their existence prior to the institution of bankruptcy proceedings, and there is absolutely no evidence whatsoever that any creditor was ever hindered, delayed or defrauded in the slightest degree by any act or conduct of this claimant, or the other persons connected with the Summit Investment Company transaction. The trustee is merely seeking to take advantage of a condition of affairs which never injured any person, to prevent this claimant from obtaining approval of a claim which both the referee and the district judge found valid in its origin, and totally unsatisfied.

III.

TRUSTEE'S CLAIM THAT CLAIMANT'S
NOTES WERE PAID.

The next point of the trustee is that "the conveyance to the Summit Investment Company being actually not only constructively fraudulent, and Wells having participated in the fraud, he cannot now recover the consideration for the transfer." There are two difficulties in applying this rule. One is that the conveyance to the Summit Investment Company was not actually fraudulent, and the other is that Wells is not seeking to recover any consideration for that transfer.

We can only judge of a man's motives by what he says and does. Mr. Wells testified that his ultimate motive in making this transfer was to preserve the assets of the estate from being frittered away in damage suits. It was his idea, to use his own words, "to surround these resources by such safeguards as would prevent their being dissipated in that manner and to use them for the purpose of carrying out the contracts of the company in regard to their water rights and cultivation of the land". If this was not the real motive of the participants herein what could have been? Counsel for the

trustee in another portion of their brief state "no idea of a preference to themselves ever entered their minds". (Trustee's brief, p. 40.) It is clear that they were not seeking any personal preference for themselves, as if that had been the case all that they would have had to do would have been to take the property themselves, cancel their indebtedness to the company, and at the end of four months the preference would have been unassailable in bankruptcy. We would then have had conduct which the Supreme Court of the United States has declared not to be fraudulent in fact but only contrary to the provisions of the bankruptcy act if attacked in time.

Instead, however, of grabbing this property for themselves these parties turned over as it accrued all rental arising from the property to the Orchard Company. As soon as the conveyance was questioned they entered into the agreement of December 30, 1912, wherein every one agreed that this property was the property of the Orchard Company. Mr. Wells' motive toward the company and its creditors can be further seen by the fact that subsequent to the Summit Investment Company transaction, he loaned the company over \$3,000, a large portion of which he borrowed from the bank for that purpose,

and when a judgment was entered against the company in the summer of 1912 for \$1,750 he obligated himself personally upon the company's supersedeas bond to enable the company to appeal to the Supreme Court. We respectfully submit that this conduct is absolutely incompatible with the idea that Mr. Wells set to work deliberately to defraud the persons who had had business transactions with the company.

The claimant here is not seeking to recover back any consideration paid for the transfer to the Summit Investment Company. There was no such consideration. The reason why the transfer to the Summit Investment Company was constructively fraudulent, was that it was without consideration. If Gates had actually had those notes and had cancelled them in consideration of this conveyance, the conveyance would, if timely attack in bankruptcy had been made, have been an unlawful preference against the bankruptcy act, but it would otherwise have been a perfectly good transfer. The only reason why the conveyance was admittedly constructively fraudulent was that it was without consideration, and if it was without consideration Wells cannot now be said to be seeking to recover any consideration paid for such conveyance.

The cases cited by the trustee's counsel in support of this proposition are cases where parties are seeking to recover considerations paid for fraudulent transfers where they were guilty participants in actual fraud. Furthermore, in most of the cases they were seeking to recover the considerations as conditions precedent to the setting aside of the transfers. The law in such cases is clearly not applicable to this case. Also but one of the cases cited by the trustee upon this point was a bankruptcy case, and that case is *In re Freidman*, 164 Fed. 131, where the court refused to find that the claimant ever had a valid claim against the estate, for good and sufficient reasons appearing in the opinion of the court.

We have fully argued this phase of the question upon pages 11 to 26 of our appellant's brief on the appeal of L. V. Wells. We will therefore content ourselves at this time with a reference to that argument and respectfully submit that it is the rule of the Supreme Court both in equity and in bankruptcy that the holder of a valid claim in the absence of the retention of an unlawful preference, is entitled to all the rights of a creditor, regardless

of what his conduct in connection with his claim may have been.

Clements vs. Nicholson, 6 Wall. 299.

White vs. Cotzhausen, 129 U. S. 329.

U. S. Rubber Co. vs. American Oak L. Co.,
181 U. S. 434.

Hutchinson vs. Otis, Wilcox & Co., 190 U. S.
552.

Keppel vs. Tiffin Savings Bank, 197 U. S.
356.

Page vs. Rogers, 211 U. S. 575.

We cannot pass this point without calling attention to a very material misrepresentation set forth near the top of page 42 of the trustee's brief. Counsel there mention the "finding of the court and of the referee who saw and heard the witnesses on the stand that the facts constituted a fraud in fact". The referee never made any such finding. As to what the district judge found, who neither saw nor heard the witnesses—his opinion speaks for itself. If he had been satisfied that the claimant intended to defraud the creditors of the bankrupt, he would doubtless have said so in so many words. We would call attention particularly to the language of the district judge when he is referring to the testimony of Wells that "it therefore appears that the scheme

when stripped of its euphony is to hinder and delay creditors''. His omission of the word defraud in this connection could not have been an oversight.

IV.

Lastly, counsel for the trustee argue that inas-much as because at the time of the institution of bankruptcy proceedings, the legal title to this property stood in the Summit Investment Company, this claimant is thereby barred from asserting his claim. Counsel for the trustee in arguing this point overlook the fact that at the time of the institution of bankruptcy proceedings there was a binding contract in existence by which all of the officers and stockholders of the Summit Investment Company had declared this property to be the property of the Wenatchee Heights Orchard Company, and had bound themselves to use this property in the carrying out of the corporate purposes of the Orchard Company. There is no claim but what this contract was entered into in good faith by all parties to it. The only thing outstanding at the time of the institution of bankruptcy proceedings was the bare legal title, and the trustee in bankruptcy under the bankruptcy act upon his appointment became vested with that legal title. The only effect of the subsequent

deed was to show the purpose and intent of the previous holders of that title. There was absolutely no question at any time but what this property was the assets of the bankrupt. The trustee in bankruptcy under §70 of the Bankruptcy Act could have transferred to a purchaser an absolutely good title to this property without having received any deed at all from the Summit Investment Company. The claimant does not need to rely upon any events which happened subsequent to the beginning of bankruptcy proceedings, as there can be no question but what at the time of the institution of these proceedings the assets of the Summit Investment Company were the assets of the bankrupt corporation.

Furthermore in this contention, counsel for the trustee overlook §57(g) of the Bankruptcy Act which as interpreted by the Supreme Court of the United States provides that any preferred creditor upon his preference being recovered by the trustee, whether with or without the consent of such preferred creditor, can nevertheless prove his claim, and this, under *Page vs. Rogers*, 211 U. S. 577, (quoted from at length in our brief upon the appeal of this claimant) applies even where the preferred claimant has been guilty of actual fraud in obtaining his preference.

We note that counsel for the trustee upon page 43 of the trustee's brief, sees fit to cite from a brief of claimant's counsel which they are kind enough to say was submitted in another question. This is entirely apart from the record, but as a personal matter we would like to explain that this other question was a question which was answered by the district judge in the final paragraph upon page 48 of the transcript where he says: "If such an order were made, and the expense incurred of increasing the water supply, the claims of the contract holders for a shortage of water would still exist." We were there discussing whether the court should order that the executory contracts of the trustee personally and his friends should be specifically enforced in full at the expense of general creditors of the estate. What we said upon that question was held by the district judge to be good law and counsel for the trustee is not seeking to set it aside. Furthermore, if the entire argument from which this is a quotation were exhibited it would clearly appear that this statement is not in the slightest antagonistic to our statement in the present brief. We are now occupying exactly the same position that we occupied both before the referee and the district judge, and this is the first time that any claim has been advanced that we were inconsistent in our position.

V.

Finally, counsel for the trustee claim that inasmuch as it was Gates who turned over the stock of the Summit Investment Company, Wells can have no benefit therefrom. The claimant is not in this case seeking any benefit by reason of the reconveyance of the property. It is the trustee who is seeking to have this claimant practically fined the amount of the dividend upon his claim merely because the power of disposal of the assets of the estate was for a while vested in an individual who honorably laid down such power immediately when called upon. The claimant is not seeking any benefit through the Summit Investment Company transaction. He is merely endeavoring to prevent a transaction which never harmed any one else from harming himself. He testified that this note was never out of his possession, and was never paid nor cancelled. The trustee in opposition to this produced a statement of B. E. Gates, which states that he had purchased this note, the record of a resolution of the bankrupt company signed by the claimant assenting to this proposal of Gates to trade this note for the assets of the company and authorizing the sale of the assets of the company for this note,

and a conveyance of the title to these assets of the company to Gates. It will be noticed that there is not any statement contained in these records that this note was cancelled or paid, and payment is only an inference of fact from the combination of the record and the deed. This evidence was admissible for the purpose of supporting the contention of the trustee that the note had been paid, but it was by no means conclusive, and the referee who heard Mr. Wells' explanation and saw him while he was making the explanation believed Mr. Wells when he said that the note had never left his possession, and was not in fact paid, and the district judge has confirmed the finding of the referee. Even if the claimant had put upon his record the point blank statement that this note was paid, we fail to see how in the absence of his ever showing this to anybody it could affect his standing either legally or morally. We most certainly contend that a fine of the entire dividend upon a \$56,000 claim is rather severe punishment for the entry of a misleading record which was never shown to any one and which was never used in an attempt to defraud any one.

We respectfully submit that the decision of the referee who heard this witness and all the accusations hurled at him, and nevertheless refused to

find that he had been guilty of any intentional fraud, should be sustained and his claim as approved by the referee should be ordered by this court to be approved to rank with the other claims against this estate.

Respectfully submitted,

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HORATIO C. BELT,

Attorneys for Appellee, L. V. Wells.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

L. V. WELLS,

Appellant,

vs.

J. B. LINCOLN, as Trustee in
Bankruptcy of the Estate of the
Wenatchee Heights Orchard
Company, a corporation, Bank-
rupt,

Appellee.

No. 2358

*In the Matter of the Wenatchee Heights Orchard
Company, a Corporation, Bankrupt.*

BRIEF ON BEHALF OF J. B. LINCOLN,
TRUSTEE, ETC., APPELLEE.

RAYMOND D. OGDEN and
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Trustee, Etc., Appellee.*

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TRUSTEE, ETC., APPELLEE.

STATEMENT OF FACTS.

A full and complete statement of the facts, from our standpoint, is set out in the brief filed on behalf of the Trustee in his appeal and, therefore, we shall not attempt to give a complete statement of facts in this brief, but shall content ourselves with a reference to a few of the statements made in the brief on behalf of appellant Wells which we feel are not justified or supported by the record.

On pages 7 and 8 of that brief a statement is made that Gates offered to take the two notes for

the conveyance of practically all the assets of the bankrupt company to the Summit Investment Company. This statement is probably inadvertent. There is no dispute, nor ever has been, as to what Gates actually offered. His communication is set forth in full at page 37 of the record, and was a statement that he owned the two notes and in payment of them would take a conveyance of the property there described.

There is no evidence to justify the statement that there was no intention of ever cancelling the notes of Wells and McPherson which were paid by the transfer to Gates. Both Wells and McPherson, in one part of their testimony, state that the notes were actually transferred to Gates, and in another part, that they were not transferred but were always in their possession. Neither is there any evidence whatsoever in the record, nor was there any at the hearing, to support the statement made in the brief that the suit brought in the Superior Court was started without any demand being made upon Wells or McPherson or the Company for a reconveyance of the property to the Wenatchee Heights Orchard Company. So far as the record appears, there is nothing whatever to explain whether the suit was brought without demand or whether it was brought

because of a failure to respond to a demand for a reconveyance of the property.

By our silence as to the statements made in the Wells brief as to the effect of the agreement made as a result of the suit in the Superior Court, we do not wish to be understood as acquiescing therein. Our views as to the effect of this agreement upon the alleged claim of L. V. Wells will be set forth quite fully in the latter portion of this brief.

ARGUMENT.

I.

The basis of the brief submitted by Wells and the premise upon which all the argument therein must rest is that, the conveyance by the Wenatchee Heights Orchard Company to the Summit Investment Company was merely a preference to Wells and McPherson, and that, therefore, no punishment should be inflicted on them other than the loss of their preference. In support of this contention numerous cases have been cited. We have no dispute whatever with the law announced in *Hutchinson vs. Otis, Wilcox & Co.*, 190 U. S. 552; *Keppel vs. Tiffin Savings Bank*, 197 U. S. 356, or *Page vs. Rogers*, 211 U. S. 575. In our view of this case,

however, none of these cases has the slightest application to the facts as found in the record here.

There is all through the Bankruptcy Act a distinction between transfers of property which are fraudulent as against creditors and transfers of property which are mere preferences. This distinction is not only one of words. It is a real, substantial distinction which is drawn as a result of the facts surrounding the transaction and the intention of the parties, and which results in a great difference of punishment to be inflicted upon the guilty party. A preference is defined in Sec. 60-A of the Bankruptcy Act as follows:

“A person shall be deemed to have given a preference if, being insolvent, he has *within four months before the filing of the petition, or after the filing of the petition and before the adjudication* * * * made a transfer of any of his property and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class.”

The original Act, in defining a preference, omitted the words italicized in the above quotation, making any transfer of property the effect of which was to enable a creditor to obtain a greater percentage of his debt than other creditors of the same

class, a preference irrespective of the time when it was made. Under the Act as amended, however, there is no preference unless the transfer was made within four months of the filing of the petition. In the case at bar the transfer in question was made October 10th, 1911, more than one year prior to the filing of the petition. Manifestly, it could not be a preference, time being one of the essential elements under the Act as amended.

Not only is the length of time fatal to the consideration of this claim as a preference, but there are other reasons why it should be considered not as a preference but solely as a transfer, with the intent to hinder, delay and defraud creditors.

One other essential, in fact the most important one, to the commission of an act of bankruptcy is, that there should be a transfer of property, the effect of which will be to enable a creditor to obtain a greater percentage of his debt than any other creditor of the same class. Now it is contended by Wells in this case, not only prior to the institution of these proceedings but now in this court, that his debt was not paid nor secured, nor was McPherson's, by the transfer of the property to the Summit Investment Company. He says in his brief, in the statement to which we have alluded, on page 8, that

“The two notes of Wells and McPherson were never out of the possession of the payee; there *was no intention of cancelling them and they were, in fact, not cancelled.*” Now, if this statement is true, the property transferred to the Summit Investment Company was not given in payment of the notes issued to Wells and McPherson. There is no contention made now that the conveyance was intended to be a mortgage, or security for the notes. There never has been any such claim. Consequently, there was not a conveyance to a creditor nor to any one for his benefit, the effect of which was to enable the creditor to realize a greater portion of his claim than the other creditors of the same class. The notes to Wells and McPherson, according to this claim, were still outstanding, valid claims against the company and were unsecured and so remained at all times. How then can it be said that by this transfer Wells and McPherson, or any creditor, was able to receive a greater percentage of his debt than other creditors of the same class? It is true that if Gates, although he was not legally bound to do so, would hold the stock of the Summit Investment Company in trust for Wells and McPherson, they would receive more property than they otherwise would have received, but this property, according

to their present contention would not have been received as a payment of their debt but as their share of the plunder from the looting of the Wenatchee Heights Orchard Company and would not affect the percentage they would receive on their claims, except to reduce it, because on the final wind-up there would be that much less to divide among the creditors including themselves. Consequently, every material element of a preference is lacking in the present conveyance. It is without the time limit and it did not have the effect of giving a creditor a greater percentage of his debt. According to this theory, it is merely a conveyance with a secret trust in favor of the grantor.

II.

Looking at the transfer, however, from the standpoint of what the record of the Wenatchee Heights Orchard Company—made at the time—shows, and as it appears, according to the testimony of Wells, given in the bankruptcy proceeding, we still contend that this conveyance must be looked at, not as a preference, but as a conveyance to hinder, delay and defraud creditors.

Prior to the enactment of the bankruptcy law in 1898, there was no reason known to a court of

equity why an insolvent debtor should not transfer to a *bona fide* creditor, with the intention of paying him, any portion of his property, so long as the property was conveyed at a fair valuation and solely with the honest intention of paying the creditor. The mere fact that the creditor would receive more than others was not considered wrong in a court of equity. There were known, however, to courts of equity ever since they have been established, conveyances made for the purpose of hindering, delaying and defrauding creditors. Those have always been subject to attack and condemnation wherever found. The distinction between the two has been recognized by the Bankruptcy Act. In its definition of a preference and the denunciation thereof and its provision for the return of the property conveyed as a preference, the Bankruptcy Act limits the punishment to a return of the property. In other words, it says that in such an act there is nothing immoral nor illegal nor contrary to the principles of honesty and fair dealing insisted on by a court of equity. This is merely an act which for the purpose of procuring an equal distribution of an insolvent, debtor's property, if it is followed within four months by the bankruptcy of the grantor, has been declared by Congress to be subject to rescission. As to conveyances made with intent to

hinder, delay and defraud creditors, however, the Bankruptcy Act takes a different view. It allows the laws of the State Court to govern, and provides simply that any conveyance which, as against the creditors of the bankrupt is void, shall be void as against the trustee. In other words, it makes the trustee the representative of the creditors to set aside any conveyances which they themselves could have set aside had bankruptcy not intervened. The remedies which a trustee has are the same as creditors had prior to the passage of the Act.

In this case there are two fundamental features which the trustee relies upon to show this transfer was actually made with the intent to hinder, delay and defraud creditors. First, the conveyance itself and the minutes which provide for it. In them is a letter from Gates in which he recites his ownership of the notes and his willingness to satisfy the notes upon a transfer of the property. That statement is presented to a meeting of the trustees at which are present—as the only trustees of the corporation—the payees of the two notes which Gates alleges have been transferred to him. That meeting (which is Wells and McPherson) adopts a resolution accepting the proposition. The minutes of this meeting will be found on page 84 of the record.

Mr. Wells in his testimony gives the reason and necessity for the performance. He says, at pages 90 to 92, practically, that they, (Wells and McPherson), believed others besides Hotchkin would be able to recover judgments against the company. Hotchkin, it will be remembered, had secured a judgment against the bankrupt for failing to supply sufficient water. Wells was anxious to discourage any further suits, and he believed that if he put the property of the company out of its name these persons, (the other creditors in this bankruptcy proceeding), would believe that the company had no property and that if they brought suit to recover they would not be able to realize thereon, and, therefore, for the purpose of discouraging them from commencing suit this transfer was made. It seems to us that comment on this testimony or argument to prove that it showed a wilful, deliberate attempt to defraud creditors is absolutely unnecessary.

Judge Cushman, in his opinion in this case, found that this conveyance was for the purpose of defrauding creditors and that it had that effect. Not only Judge Cushman found it on the hearing on this claim, but the referee found it also, and both the referee and Judge Cushman found the same

thing in the hearing on the adjudication. The statement of counsel that the referee who heard witnesses on the stand had found them not guilty of fraud is not only without foundation in the record, but is absolutely untrue. In his first report as Special Master on the hearing on the adjudication the referee found this conveyance was made for the purpose of hindering, delaying and defrauding creditors. That holding was approved by the Court in the opinion by Judge Cushman found in 204 Fed. 674. The exceptions to the referee's report were overruled in the order of adjudication and consequently it has been conclusively adjudged in this case that this conveyance was a conveyance for the purpose of hindering, delaying and defrauding creditors prior to the filing of the claim of Wells. In the hearing on the claim, the Referee did not find Wells not guilty of fraud. He did find that there was no evidence of fraud in the original subscription to the capital stock, but under the later decisions of the Supreme Court, as shown in our brief, that question becomes immaterial. The only holding he made in the hearing on the claim as to the character of the conveyance to Gates is found quoted by Judge Cushman in his opinion and is as follows:

“While it is possible that neither party to these transactions between the corporation and

the Summit Investment Company would have been entitled to relief as against the other, yet having been obtained, the consideration, though fraudulent, must be returned."

It will thus be seen that every court that has passed upon this transaction has, at every step of the litigation, held that it was a transfer made with the intention of deliberately and wilfully defrauding the creditors of the Wenatchee Heights Orchard Company.

In re Wenatchee Heights Orchard Co., 209 Fed. 84.

Judge Dodge, sitting in the District Court of Massachusetts, *In re Maher*, 144 Fed. 503, which has been quoted with approval by the Supreme Court of the United States in *Coder vs. Arts*, 213 U. S. 223, makes very clear the distinction between a preference and a transfer in fraud of creditors, and makes clear the fact that there was no intention on the part of Congress to confuse the two, but that all through the Act there runs a clear distinction between the two classes of conveyances. In that case one of the grounds of objection to a discharge was that the bankrupt, with the intention to do so, had given a preference to one of his creditors, and the claim was made that that constituted an objection to his discharge under Sec. 14-b 4 which makes

it an objection to a discharge that a bankrupt has within four months transferred, removed, destroyed or concealed, or permitted to be removed, destroyed or concealed, any of his property with intention to hinder, delay or defraud his creditors. There was no question in the Maher case but what there had been a preference which was voidable, and, as shown in the opinion of Judge Dodge, the facts showed that the transfer was not such a one as would have been denounced by a court of equity prior to the passage of the Bankruptcy Act as a transfer to hinder, delay or defraud creditors. With the opinion of Judge Dodge is printed the report of the referee. Together they contain an admirable and complete history of the acts of bankruptcy with reference to this proposition. At page 505 of the opinion it is said:

“In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors and not to him.”

This quotation, which is the one cited with approval by the Supreme Court in the case of *Coder vs. Arts, supra*, gives succinctly the real dis-

inction between mere preference and transfers to hinder, delay and defraud creditors. The first is merely a violation of the bankruptcy provisions and embraces within it no idea of moral wrong-doing. The second necessarily includes an element of wilful fraud, such as is found in the testimony of Wells, referred to above.

As we have pointed out, this was found in the court below in his decision on this claim.

To the same effect see

Coder vs. Arts, 213 U. S. 223.

1 Loveland on Bankruptcy, 975.

Van Iderstine vs. Nat. Discount Co., 174 Fed. 518.

Githins vs. Shiffer, 112 Fed. 505.

Everything that has been done by Wells and McPherson prior to the filing of this petition has been done with the intent and purpose to make the records of the bankrupt show that the conveyance to the Summit Investment Company was an absolute one, which divested the Wenatchee Heights Orchard Company of any interest in the property conveyed, and that the consideration for the conveyance was the final and absolute payment of the notes mentioned in the proposal of Gates. Not until the adjudication and the passing out of their hands of

the control of the Wenatchee Heights Orchard Company did they ever contend otherwise. Even when the question of the liability of the Wenatchee Heights Orchard Company was a most material one, in the hearing on the adjudication, they never urged that these claims of theirs existed.

III.

One other question to be considered in an answer to the Wells brief is as to the effect of what counsel calls the voluntary restitution by the Summit Investment Company. We have pointed out in our brief, filed in the appeal of the trustee, that Wells must be estopped to claim that Gates did not have the notes and that the notes were not paid, he having induced the corporation to part with its property on the representation that they were in the hands of Gates and that this conveyance would pay them. So we may start this argument upon the premise that up to the time, at least, that the agreement was made between Benninghausen, Ryer, McElwain, Gates, the Summit Investment Company and the Wenatchee Heights Orchard Company, six days after the suit was filed in the State Court and a Receiver was appointed, the notes to Wells and McPherson were paid, and that the corporation

could have defended against any suit by Wells and McPherson.

It is claimed by counsel, without any foundation in the record, that the suit in the Superior Court was made without any demand and that this argument was voluntarily made by Wells and Gates. There is nothing in the record on the subject one way or another, but so long as counsel has travelled outside to insist that there was no demand and the agreement was voluntary, we think we may give what we understand to be the truth of the matter. That for the entire six days after the suit was started Mr. Gates stubbornly insisted that he and he alone was the actual owner of the stock of the Summit Investment Company, and that no one had any interest therein but himself, and that he did own the Wells note when he made the proposition and refused to give up any part of the property transferred to him. And it was only when legal proceedings other than civil were threatened, as a result of some of the transactions he had had with the bankrupt, that the agreement was finally entered into; and there is this in the record to substantiate that: That when the bankruptcy proceedings were commenced and Mr. Gates was on the stand, he insisted then that he owned the notes and that they

were transferred to him for a valuable consideration. At that time Wills, McPherson and Gates were defending against an adjudication and claimed the corporation was solvent and therefore they at that time desired to make the liabilities appear small. Consequently, it was not then claimed by them, or by the corporation which consisted of them and them alone, that these notes were outstanding. They were content with the testimony of Gates that the notes were his property and had been paid, because he then said the bankrupt owed him nothing whatever. This claim now that the notes were not paid and were not the property of Gates is playing fast and loose with the Court.

The agreement to which counsel refers, which was made with the hope of settling the State Court litigation, and the material parts of which are found beginning on page 93 of the record, did not transfer this property back to the Wenatchee Heights Orchard Company. The agreement provided that the board of trustees of the Summit Investment Company should be increased to five. It provided that Benninghausen, McElwain and Ryer, together with Wells and McPherson, were to be trustees; that Benninghausen was to hold all the stock "until", (and we quote from the agreement itself, on page

94), "the obligations of the said Wenatchee Heights Orchard Company shall have been performed, or until such prior time as the parties hereto shall agree that said stock shall be delivered by said trustee" (Benninghausen) "to such person or persons as the parties hereto shall appoint." Again, on page 96, still quoting from the agreement, "That the capital stock held by each of the parties hereto and by said G. Benninghausen, or his successor, shall be held," etc., * * * "until the obligations of the said Wenatchee Heights Orchard Company shall have been performed, or until the parties hereto shall have agreed otherwise." In other words, when the agreement was executed the property was not re-transferred to the Wenatchee Heights Orchard Company, nor did the agreement have the legal effect of transferring the property to the Wenatchee Heights Orchard Company. If the obligations of the Wenatchee Heights Orchard Company had amounted to fifty thousand dollars, and the total value of the property conveyed had been worth, as Wells and McPherson say they believe it was, one hundred thousand dollars, to whom would the fifty thousand dollar surplus have gone? Manifestly, under this agreement, the moment the obligations of the Wenatchee Heights Orchard Company

had been performed Benninghausen and the rest would have been obligated to transfer their stock in the Summit Investment Company back to the man from whom they received it—back to B. E. Gates—and he could have done with that property what he chose, because, it being a transfer to hinder, delay and defraud creditors, neither the Wenatchee Heights Orchard Company nor any of its stockholders could claim any relief if Gates refused to carry out his trusteeship (now claimed by Wells to have existed) and claimed the property absolutely. On that proposition no citation of authorities is necessary. Not only that, but at any time that Benninghausen, McElwain and Ryer had decided that they were satisfied, they could have agreed with Wells and McPherson and Gates to turn the shares of stock in the Summit Investment Company, and with them the control of the property, back to Gates, the fraudulent grantee, and the remaining creditors of the Wenatchee Heights Orchard Company would have been left as they were before the State Court suit had been commenced, to commence anew an action to set aside the conveyance.

Again, what virtue can Wells claim by reason of the fact that Benninghausen, McElwain and Ryer, a majority of the board of trustees of the

Summit Investment Company, themselves creditors of the corporation, in violation, if you will, of their agreement with Wells, turned this property over to the trustee in bankruptcy of the Wenatchee Heights Orchard Company? It was not through any act of Wells that they turned it back. He took no part in it. He could not have prevented it. It was transferred because, as the resolution recites, the District Court of the United States, in the original hearing on the adjudication in this case, had, as a necessary part of its decision, held the transfer to the Summit Investment Company fraudulent and void as against the creditors. If that act of the majority of the trustees of the Summit Investment Company gave rise to any right on the part of Wells, it was a right of action against the Summit Investment Company, or against Benninghausen, Ryer and McElwain, the trustees, individually, for a violation of the agreement entered into in the Superior Court suit. But to that suit there would have been the absolute defense that the conveyance to the Summit Investment Company was in fraud of creditors; that Wells could not set up his own fraud and ask any relief on it, and that the Summit Investment Company was entitled to hold that property free from any claim of the Wenatchee

Heights Orchard Company or its stockholders. Now, if he had no right of action against the Summit Investment Company, which had agreed to hold the property for him, why a right of action against the Wenatchee Heights Orchard Company because its fraudulent grantee failed to keep the agreement which it was not bound in law to keep? In other words, Wells could not complain as against the Summit Investment Company that it had not kept its agreement, because the agreement was void as against public policy. The Wenatchee Heights Orchard Company could never complain of that agreement for the same reason. Why, then, should Wells have a claim against the Wenatchee Heights Orchard Company because of that fact?

In conclusion, we can only say that the only case cited by counsel which is on the question of fraudulent conveyances at all is the *American Oak Leather* case in 181 U. S. That case was based, however, as we have pointed out in our other brief, solely upon the proposition that there was no actual intent to defraud. If there had been an actual intent to defraud, then the Court, as it says, would have followed the opinion of the Circuit Court of Appeals for the Seventh Circuit, which is found in 96 Fed. 891. In this case there is fraud, by reason

of the self-expressed intention of Wells, the appellant, to put the property of the corporation where creditors would believe the corporation no longer owned it and, therefore, be discouraged from starting suits against it. What else constitutes actual fraud in a conveyance by an insolvent debtor?

We trust the Court will not understand from what we have said that we concede that the return of this property to the trustee of the Wenatchee Heights Orchard Company was a voluntary conveyance. Every step that has been taken has been looking towards a re-conveyance, has been taken only after litigation commenced and as a means of settlement. The lower Court, in his opinion (Record, page 48) found expressly that it was not a voluntary surrender. We contend that there is in the record more than ample evidence to justify this finding and none that is contrary to it.

One other serious question presents itself in the consideration of this case. Has the illegal transfer to the Summit Investment Company been rescinded so far as the Wenatchee Heights Orchard Company is concerned? It is true that the Summit Investment Company has deeded the property to the trustee. Has that deed, however, any greater effect than would a judgment against the Summit Investment

Company in a suit by the trustee? The conveyance was made solely because of the finding already made by this Court that the conveyance was made to hinder, delay and defraud creditors. If a suit had been brought by the trustee to recover this property and he had recovered judgment and there had been any surplus after paying the creditors of the Wenatchee Heights Orchard Company that surplus would have gone, not to the Wenatchee Heights Orchard Company, but to the Summit Investment Company. No different rule applies where the conveyance is made before judgment and merely for the reason that the conveyance has already been declared invalid. In this case, if there is any surplus after the paying of the debts of the Wenatchee Heights Orchard Company then the surplus goes to the Summit Investment Company and not to the Wenatchee Heights Orchard Company. That being true, so far as the Wenatchee Heights Orchard Company itself is concerned, the illegal transfer made by its trustees to the Summit Investment Company has never been rescinded. Its equity in the property over and above the amount of its liabilities it has lost forever. For that equity it received the notes originally issued to Wells and McPherson. Why should a court of equity now take from it that con-

sideration which it received for its property, the conveyance of which has caused it to be involved in litigation and adjudged a bankrupt and deprived of the exercise of its corporate rights? What greater price could have been paid for these notes than has been paid by this bankrupt and by its creditors? What more ample payment could have been made?

Respectfully submitted,

RAYMOND D. OGDEN and
WALTER SCHAFFNER,

Attorneys for J. B. Lincoln,
Trustee, Appellee.

No. 2362

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

CALLENDER NAVIGATION COMPANY, a Corporation, Claimant of the Steamer "MELVILLE," Her Tackle, Apparel, Furniture, etc.,

Appellee.

Apostles.

Upon Appeal from the United States District Court for the District of Oregon.

FILED

JAN 16 1914

No. 2362

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Circuit Court of Appeals

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UNITED STATES OF AMERICA,
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Apostles.

Upon Appeal from the United States District Court for
the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names of Proctors.]

CLARENCE L. REAMES, United States Attorney,
ROBERT R. RANKIN, Assistant United States At-
torney,

Proctors for Appellant.

G. C. FULTON,

Proctor for Appellee. [1*]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Libellant and Appellant,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Defendant.

CALLENDER NAVIGATION COMPANY, a Cor-
poration,

Claimant and Appellee.

Praeceptum for Apostles.

To the Clerk of the Above-entitled Court:

You will please prepare the apostles in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon the appeal heretofore perfected in this court, and include in said apostles the following pleadings, proceedings and papers on file, to wit:

*Page-number appearing at foot of page of original certified Record.

1. All those papers required by Subdivision One of Section One of Rule 4 of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and other matters thereby required.

2. All the pleadings in said cause including the libel of information, the stipulation, the claim and the answer. [2]

3. All the testimony and other proofs adduced in said cause.

4. The opinion of the court.

5. The final decree and the notice of appeal.

6. The assignments of error.

And prepare said apostles as required by law and the rules of the District Court of the District of Oregon and the rules of the said Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 17th day of December, 1913.

ROBERT R. RANKIN,
Assistant United States Attorney. [3]

Statement of the Clerk of the United States District Court.

In the District Court of the United States for the District of Oregon.

No. 5920.

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

PARTIES.

Libelant: United States of America.

Defendant: The steamer "Melville," her tackle, apparel, furniture, engines, boilers, and machinery.

Claimant: Callender Navigation Co., a Washington Corporation.

PROCTORS.

Libelant: Clarence L. Reames, United States Attorney, and Robert R. Rankin, Assistant United States Attorney.

Defendant and Claimant: G. C. Fulton, Esq.

1913.

February 17. Filed verified libel.

March 4. Filed stipulation of Callender Navigation Co., waiving actual seizure of the "Melville" and publication of process herein.

March 4. Filed claim of the Callender Navigation Co., a corporation.

March 4. Filed answer of the Callender Navigation Co., a corporation, claimant.

March 20. Application to set cause for trial.

March 24. Order continuing time for setting cause for trial.

May 12. Order setting time of trial for June 25th, 1913, at 10 o'clock A. M. [4]

June 25. On this day the above-entitled cause came on regularly for hearing in the District Court of the United States for the District of Oregon, held in the courtroom thereof, in

the city of Portland, District of Oregon, before the Honorable C. E. Wolverton, Judge of said Court, and the following proceedings were had:

Mr. Geo. O. Mowry, Assistant United States Attorney, appeared for libelant, and G. C. Fulton appeared as proctor for defendant and claimant; whereupon Mr. Fulton moved to strike certain parts of the answer;

It is ordered that said motion be and the same is hereby granted; and

Thereupon H. F. McGrath was sworn and examined by the Government and thereupon the Government rests; and

Thereupon J. B. Yeon, S. C. Morton, G. H. Callender and M. F. Brady were sworn and examined as witnesses on behalf of the defendant, and thereupon the defendant rests, and evidence was closed; and

Thereupon, after argument of proctors for respective parties, the cause was submitted; and

Thereupon, the Court being fully advised in the premises, it is

ordered, adjudged and decreed
that the libel be, and the same is
hereby dismissed.

June 25. Final decree filed.
December 17. Filed notice of appeal.
December 17. Filed praecipe for apostles.
December 21. Filed assignment of errors.
December Filed stipulation as to hearing of ap-
peal. [5]

*In the District Court of the United States for the
District of Oregon.*

No. —.

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

Libel of Information, U. S. R. S. 4499.

To the Honorable Judges of the District Court in
and for the District of Oregon:

Comes now George O. Mowry, Assistant United
States Attorney for the District of Oregon, who
prosecutes for the United States in this behalf, and
being present herein in Court in his own proper per-
son, in the name of and in behalf of the United
States, brings this libel of information against the
steamer "Melville," her tackle, apparel, furniture,
etc., and against all persons intervening therein, in
a cause of seizure and alleges and informs as fol-
lows:

I.

That heretofore, on, to wit, the 12th day of October, 1912, a certain vessel being a steamer called the "Melville," was used and employed in the transportation of passengers on the navigable waters of the United States, to wit, on the Columbia River in the District of Oregon.

II.

That on said 12th day of October, 1912, at St. Helens, Oregon, the said "Melville" did take on board and carry and convey therefrom on the said Columbia River to a point approximately opposite the St. Helens shipbuilding yards in said District of Oregon, a greater number of passengers than she was permitted by law to carry. [6]

III.

That the number of passengers stated in the said vessel's certificate of inspection duly issued by the duly authorized inspector for said district, and which she was entitled by law at said time to carry, was seventy-five (75), and that on said date and at said place, the said vessel took on board and carried on said voyage, one hundred and nineteen (119) passengers, contrary to the provisions and form of the statutes of the United States in such case provided, by reason whereof the owner or owners of said steamer, forfeited and became liable to pay to the said United States the sum of Five Hundred (\$500.00) Dollars, for the payment of which said sum the said steamer has become liable to be seized and proceeded against by way of libel and for the recovery of which this cause is now instituted.

IV.

That at the present time the said steamer "Melville" is within the said District of Oregon, and that all and singular the premises aforesaid were and are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

V.

WHEREFORE, the said Assistant United States Attorney for the United States, in behalf of the United States, prays the usual process and monition against the said steam vessel, her tackle, apparel, furniture and other appurtenances, in this behalf to be made, and that all persons interested therein may be cited to appear and answer the premises, and that this Honorable Court may be pleased to decree for the penalties aforesaid and that the said vessel may be condemned and sold to pay the penalties aforesaid, with costs, and for such other and further relief as shall to law and justice appertain.

(Signed) GEORGE O. MOWRY,

Assistant United States Attorney. [7]

United States of America,
District of Oregon,—ss.

I, George O. Mowry, Assistant United States Attorney for the District of Oregon, being duly sworn, depose and say that I have prepared the foregoing Libel of Information and that I know the contents thereof and verily believe the statements therein contained to be true, and that the same was prepared from information contained in reports, documents and records submitted to the United States

Attorney by the Collector of Customs, Port of Portland, Oregon.

(Sgd.) GEORGE O. MOWRY.

Subscribed and sworn to before me this 15th day of February, 1913.

[Seal]

CHARLES C. HINDMAN,
Notary Public for Oregon. [8]

[Acceptance of Service of Process.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

United States of America,
District of Oregon,—ss.

Due service of process in the above-entitled cause is hereby accepted at Astoria, Oregon, in the above district, this 18th day of February, 1913, by receiving a copy of the libel filed therein and a copy of said process therein issued on the 17th day of February, 1913, both duly certified to as such by George O. Mowry, Assistant United States Attorney.

CALLENDER NAVIGATION CO.

By _____,
President.

(Signed) G. C. FULTON,
Proctor for Deft. and Owner. [9]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Claim of Vessel.

To the Honorable Judges of the District Court in
and for the District of Oregon:

Comes now the Callender Navigation Co., a corporation duly organized, existing and doing business under the laws of the State of Washington, and appearing before this Honorable Court, claims the above-named steamer "Melville," her tackle, apparel, furniture, etc., and states that it is the true and *bona fide* owner thereof and that no other person is the owner thereof.

CALLENDER NAVIGATION CO.

[Corporate Seal] By C. H. CALLENDER,
Secretary.

G. C. FULTON,

Proctor for Owner.

United State of America,
District of Oregon,—ss.

I, C. H. Callender, being first duly sworn, upon oath depose and say: That I am Secretary of the above-named Callender Navigation Co., a corporation, and that I prepared the foregoing claim to the above-named steamer "Melville," and that I know

the contents thereof and that the statements therein contained are true as I verily believe.

C. H. CALLENDER.

Subscribed and sworn to before me this 20th day of February, 1913.

[Notarial Seal]

G. C. FULTON,

Notary Public for Oregon. [10]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

Stipulation.

WHEREAS, a libel of information was filed on the 17th day of February, 1913, by the United States Attorney for the District of Oregon, in behalf of the United States against the above-named steamer "Melville," her tackle, apparel, furniture, etc., for the reasons and causes in said libel mentioned; and

WHEREAS, the actual seizure of said steamer and the publication of process herein has been waived on the agreement of the Callender Navigation Co., a corporation, the owner of said steamer "Melville," to appear in said suit and file proper claim and stipulation; and

WHEREAS, a claim to said steamer has been filed by the said Callender Navigation Co.; and the said Callender Navigation Co., claimant, and C. H. Cal-

lender and L. F. Laurin, its sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of said claimant, or its sureties, execution for the sum of One Thousand (\$1,000) Dollars, being double the amount claimed by the said libellant, may issue against their goods, chattels and lands:

NOW, THEREFORE, the condition of this stipulation is such that if the said Callender Navigation Co. the said claimant herein, and C. H. Callender [11] and T. F. Laurin, its sureties, shall abide by all orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this court, or by any Appellate Court if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and effect.

CALLENDER NAVIGATION CO.

[Corporate Seal] By C. H. CALLENDER,
Secretary.

C. H. CALLENDER, (Seal)

T. F. LAURIN, (Seal)

Sureties.

Taken and acknowledged before me this 20th day of February, 1913.

[Notarial Seal] G. C. FULTON,
Notary Public, State of Oregon, Residing at Astoria,
Oregon.

United States of America,
District of Oregon,—ss.

We, C. H. Callender and L. F. Laurin, sureties above named, being first duly sworn, do severally de-

pose and say: That I reside in the District of Oregon and am a householder therein and am worth the sum of one thousand (\$1,000) dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution.

C. H. CALLENDER.

L. F. LAURIN.

Subscribed and sworn to before me this 20 day of February, 1913.

G. C. FULTON,

Notary Public for Oregon, Residing at Astoria,
Oregon. [12]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
etc.,

Respondent.

Answer.

To the Honorable CHARLES E. WOLVERTON
and ROBERT S. BEAN, Judges of the District
Court in and for the District of Oregon:

The answer of Callender Navigation Company, owner of the steamer "Melville," her tackle, apparel and furniture, to the libel of the United States of America against said steamer "Melville," in a cause of contract, civil and maritime, and the said

respondent alleges and propounds as follows, that is to say:

I.

That this respondent is and at and during all the times in said libel mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington.

II.

That respondent, Callender Navigation Company, is now and was at and during all the times mentioned in said libel of information the sole owner of the said steamer "Melville," her tackle, apparel and furniture complete, and no other person had or has now any right, title or interest therein or thereto.

III.

This respondent answering unto paragraph numbered I of said libel of information admits the same, and the whole thereof.

IV.

This respondent answering unto paragraph numbered II of said libel of information denies the same, and the whole thereof, [13] and each and every allegation therein contained, and specifically denies that on the 12th day of October, 1912, or at any other time, or at St. Helens, Oregon, or elsewhere, the said steamer "Melville" did take on board, and did take on board and carry, or did carry or convey, from St. Helens, Oregon, or elsewhere, or on the Columbia River, or elsewhere, to a point approximately opposite said St. Helens, or elsewhere, or to the St. Helens Shipbuilding Yards, or elsewhere in the District of Oregon, or at all, a greater number of pas-

sengers than she was permitted to carry by law.

V.

This respondent answering unto paragraph numbered III of said libel of information admits that the number of passengers that said steamer "Melville" was authorized to carry on said October 12, 1912, was 75, but denies that on said date, or at said place, or at any time whatever, or at all, the said vessel took on board or carried on said voyage, or any voyage, 119 passengers, or any number of passengers to exceed 75 passengers, or any passengers contrary to the provisions or forms, or any provision or form, of the statutes of the United States in such case provided, and denies by reason whereof, or otherwise, or at all, the owner or owners of such steamer forfeited or became liable to pay to the United States the sum of \$500.00, or any sum or amount whatever, or for the payment of which said alleged sum, or any sum whatever, the said steamer has at any time become liable to be seized or proceeded against by way of libel, or otherwise.

VI.

This respondent answering unto paragraph numbered IV of said libel of information admits the allegations contained therein to be true.

AFFIRMATIVE DEFENSE.

This respondent, for a further and separate answer and defense to the matters and things set forth and averred in the libel [14] of information filed herein against the said steamer "Melville" by the United States of America, represents and shows to

this Honorable Court as follows, that is to say:

That heretofore, and on the 12th day of October, 1912, the respondent was the owner of the whole of that certain steamer "Melville," her tackel, apparel, furniture, boilers and engines complete, which is described and set forth in the libel of information filed herein, and on that date the St. Helens Shipbuilding Co. had constructed and completed a large steamboat named "Multnomah" at its shipbuilding yards on an island in the Columbia River, opposite the town of St. Helens and about a quarter of a mile from the dock at St. Helens, and it advertised that on said date, at about the hour of four o'clock P. M., the said "Multnomah" would be launched into the waters of the Columbia River, and invitations were extended to the public to witness the launching thereof, and for the purpose of permitting certain of its friends, citizens of Astoria, which did not exceed fifteen in number, witnessing the launching of said steamer "Multnomah" at the said shipyards aforesaid, chartered from respondent the said steamer "Melville" for a voyage from Astoria, Oregon, to the shipyards of the said St. Helens Shipbuilding Co. aforesaid and return. That, on the morning of October 12, 1912, the said steamer "Melville" left its dock at the city of Astoria, Clatsop County, Oregon, on its voyage to said shipyards of said St. Helens Shipbuilding Co., having on board not to exceed fifteen passengers. That said steamer arrived opposite the town of St. Helens at about the hour of 3:45 P. M. of said October 12, 1912. That said steamboat passed near a dock at the town of St.

Helens, when the charterer of said steamer "Melville" observed a very few of its friends on the said dock at St. Helens, who notified them by gestures and signs that they were unable to obtain transportation from said dock to the shipyards of said St. Helens Shipbuilding Co. That [15] the said friends did not exceed fifteen in number, and thereupon, as a mere matter of accommodation, and not otherwise, the said friends were notified by the master in charge of said "Melville" that the said "Melville" would stop for them, and that for that purpose alone the said "Melville" was run alongside of a dock in said town of St. Helens, but was not moored, but the gang-plank was run ashore for the purpose of permitting the said friends of the charterer to board said "Melville," not to exceed fifteen in number, and whilst said steamer was alongside of said dock but not moored, and otherwise fastened, a large number of persons and individuals unknown to the master or crew of said steamer forcibly and violently sprang aboard whilst the friends of the charterer were being assisted in boarding the same. That a number of them sprang from the dock down on board said steamer, whilst others got aboard from the sides and stern. That the master and crew of said steamer used all possible force to prevent the said individuals and parties from boarding said steamer, but were powerless to do so, and the said steamer was immediately backed away from said wharf out into the river, and when the same was cleared from said dock the master counted the said passengers and there were on board not to exceed seventy-five passengers

in all, but he did not dare return with said boat to the wharf or dock at St. Helens, for if he had, there were a large number of individuals and persons still left on the dock clamoring to be taken on board and would have forcibly gone on board said steamboat. Thereupon the said master of said "Melville" navigated said steamer to the said shipyards of said St. Helens Shipbuilding Co. and witnessed the launching of said steamer "Multnomah," and returned said passengers to the dock at St. Helens.

That the acts herein specified and alleged are the identical acts set forth and alleged in the libel of information, and the transportation of the passengers from said dock at St. [16] Helens to said shipbuilding plant of said St. Helens Shipbuilding Co. is the same incident related and set forth in the libel of information filed herein, and not otherwise, and your respondent avers that said steamer did not carry or take on board at said time, or at any other time, to exceed seventy-five passengers. That no charge whatever was made for said transportation, and those who did board said vessel at St. Helens, with the exception of about fifteen personal friends of the charterer, boarded the same forcibly and against the protest and consent of the master and crew, and it was utterly impossible to prevent them as well as it was utterly impossible to eject them therefrom, and a larger number would have boarded said steamer had the same been docked or moored at St. Helens. That the said master and crew of said steamer exercised all their powers to prevent the said passengers from going on board said

steamer, but were utterly powerless to do so.

Respondent, for a further and separate answer and defense, alleges:

That if, as a matter of fact, the said steamer "Melville" had on board on October 12, 1912, or carried at that time between St. Helens and the shipyards opposite thereto, more passengers than allowed such steamer by law, which, of course, respondent denies, it was through no fault or want of exercise of care on the part of the master or crew of said vessel, or the owner thereof, or any person connected with the management, navigation or operation thereof, for that on said October 12, 1912, the said steamer "Melville" was chartered for a voyage from Astoria, Oregon, to the said shipyards opposite St. Helens and return, and when opposite the dock at St. Helens there were about fifteen friends of the charterer on said dock who desired to be transported therefrom to the launching of the steamer "Multnomah" at the shipyards of the St. Helens Shipbuilding Co., opposite said St. Helens, [16½] and so indicated, and for the sole purpose of taking them aboard, said steamer was run alongside of the said dock, and said friends, amounting not to exceed fifteen, were assisted on board, and while assisting the same on board a number of persons unlawfully, wrongfully and violently and against the will, consent and protest of the master and crew of said steamer and those having it in charge, boarded said steamer, and in order to prevent more from getting aboard, the said steamer was immediately by said master and crew sailed therefrom, but not until a large number had jumped

aboard from various places along said dock and places adjacent thereto and without the knowledge and consent of and against the protest of said master and crew of said steamer. That said master did not dare to return to said dock with said steamer, for there were at that time a large number of additional persons who threatened to and would have come aboard said steamer, and said master and crew were powerless to exclude the said individuals therefrom. That there was not at the time said steamer reached said dock at St. Helens to exceed fifteen persons aboard said steamer, and according to the best information obtainable by the owner, there were not to exceed seventy-five people on board said steamer at any time, but if there were any more than that, it was beyond the power of the master and crew to prevent it.

WHEREFORE, respondent having fully answered, prays that the libel of information be dismissed, and that it have and recover its costs and disbursements herein.

CALLENDER NAVIGATION CO.

By G. C. FULTON,

Its Proctor.

G. C. FULTON,

Proctor for Respondent, Astoria, Ore. [17]

State of Oregon,

County of Clatsop,—ss.

I, C. H. Callender, being first duly sworn, on oath depose and say that I am Secretary and General Manager of the respondent, Callender Navigation

Company, a corporation organized under the laws of the State of Washington, and that I have read the above and foregoing answer to the libel of information filed against steamer "Melville" by the United States of America, and know the contents thereof, and that the same is true, as I verily believe.

C. H. CALLENDER.

Subscribed and sworn to before me this 1st day of March, A. D. 1913.

[Seal]

G. C. FULTON,
Notary Public for Oregon. [18]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.

GEORGE MOWRY, for Complainant.

G. C. FULTON, for Defendant.

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Portland, Oregon, June 25, 1913.

Mr. MOWRY.—Mr. Fulton will admit, I think,

(Testimony of H. F. McGrath.)

that the "Melville's" license only allowed her to carry 75 passengers.

Mr. FULTON.—I admit that in the pleadings.

[Testimony of H. F. McGrath, for Government.]

H. F. McGRATH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOWRY.)

Mr. McGrath, you reside in Portland?

A. Yes.

Q. What is your official business?

A. Deputy Collector and Chief Inspector of Customs, this port.

Q. Was that your business and office on the 12th of October, 1912? A. Yes, sir.

Q. Were you down at St. Helens on that day?

A. I was.

Q. Did you see this steamer "Melville" there?

A. I did.

Q. Well, go ahead and state what you know about the "Melville" matter.

A. I was standing on the bow of the "T. J. Potter" when I noticed the "Melville" coming up from St. Helens. Her forward deck and the deck on each side of the cabin and aft seemed to be crowded with people. My first attention was called to it by two or three parties there stating—I guess more in a joshing way—"Well, now, Mac, you have got a job. I think that boat has got more passengers than we

(Testimony of H. F. McGrath.)

have got." I [20*—1†] immediately went to the hurricane deck, right aft of the pilot-house on top, and as the "Melville" came along I counted the passengers. She was coming sort of bow-on, coming around some other boats that were on the other side there, smaller craft she was passing. And I counted the people on the starboard side of her the best I could, along the side and on her bow, and then, of course, as she got right alongside of us, she wasn't more than 100 feet, and I finished up my count, and counted 119. That is what my ticker registered when I finished counting. And one of the things that had called my attention to the boat was the fact that about 15 minutes previous to that time the tug, or rather the fishing boat "Eureka," belonging to the Columbia River Packers Association, came up the river, and I had counted her passengers on her and found she had 75. I ran off the "Potter," and ran over to the place where the "Eureka" landed, and tallied her passengers off, and tallied up her life-preservers, and found that she had only 38 life-preservers.

Mr. FULTON.—I don't know, your Honor—excuse me—I don't know what that has to do with this case.

COURT.—This is another boat?

A. This is another boat. As to the relative size of the crowd—that is all.

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of H. F. McGrath.)

Mr. FULTON.—It is not owned by the Callender Navigation Company? A. No, no.

Mr. FULTON.—Well, then, I ask your Honor to strike that out.

A. Only just leading up to how I happened to count.

COURT.—Confine yourself to the “Melville.”
[21—2]

A. The “Melville” then went across, possibly 500 feet, to a log raft, where there were two rafts of logs moored, after she passed us. He ran her nose along the side there, and the full length of the boat alongside there, and a great many people got off on the log raft. And if I remember correctly, the boat backed up a little bit, so that those on the log raft might have an opportunity, or some of them went ahead on the log raft, and witnessed the launching from the log raft. And as she came back again, I took my same position and counted as she came back, and I counted 120 passengers. But I took the lesser amount, because I was not certain that the higher amount would go. And there was one other party that counted it, but that party is not here and not available as a witness, having died about a week ago. At that time I didn’t know that the “Melville” had carried an excess of passengers, until I arrived home on Monday, and I went into the Inspector’s office, and asked them whether or not the “Melville” had a permit, an excursion permit, and was informed that her passenger allowance was only 75. And there was nothing more for me to do then

(Testimony of H. F. McGrath.)

except make a report to the collector of the facts as I found them to exist.

Q. When you counted them the second time, you say that was when they were returning?

A. As they were returning, yes, sir.

Q. Now, in the meantime people had gotten off on the log raft, had they?

A. Yes, sir, some of them had gotten off on the log raft, to witness it, I suppose, on that side.

Q. And had gotten back on again?

A. Yes, sir. [22—3]

Q. And you counted 120 the second time?

A. Yes, sir.

Q. Do you know what is the number of the crew on the "Melville"?

A. I think her certificate says five.

Q. Five in the crew?

A. Yes, sir. I think there is master and one deck-hand, engineer and fireman, and one in the steward's department, I believe is the complement.

Cross-examination.

(Questions by Mr. FULTON.)

Did you see any of these people that you claim were passengers on the "Melville" get off the "Melville"?

A. Some of them went off on the other side.

Q. Wait a minute. I say, did you see them get off when the "Melville" was tied up alongside this log raft? Did you see any of them get off the "Melville"?

A. Well, I saw no people on the log raft when she

(Testimony of H. F. McGrath.)

pulled up alongside.

Q. Wait a moment, please. Let us have an understanding. You understand the question surely. You are intelligent enough for that.

COURT.—Answer the question, and then you may make such explanation as you desire.

Q. Did you see any person get off the “Melville” when it was up alongside this log raft you speak of? Now, that is the question. You can answer it yes or no.

A. I don’t think I could state positively I saw them get off, stepping off.

Q. Did you see any person, whilst the “Melville” was tied alongside of the log raft, get onto the “Melville,” get aboard?

A. I don’t know that I could swear positively to that. [23—4]

Q. We have no fault to find with you, Mr. McGrath, for making your complaint. That is all.

A. I understand that. I appreciate that.

(Examination by the Court.)

Q. How long did the “Melville” remain at this raft?

A. Possibly 20 minutes—25 minutes; something like that.

Q. Did it remain there during the launching?

A. Yes, sir.

Q. After the launching was over, it came back?

A. She came back; and as it came back past again, I counted the passengers.

Redirect Examination.

Q. Did you take notice of the log raft before the

(Testimony of H. F. McGrath.)

“Melville” got there? A. I think I had.

Q. Take notice whether there were people on the log raft?

A. Not to my recollection, there was not.

Q. There were not? A. No, sir.

Q. And after the “Melville” got there, did you see people on the log raft?

A. I did. Of course, there were others down below, all along on the opposite side, right opposite us, there were several of those small boats laying along there.

Recross-examination.

Q. Quite a number of boats moored up alongside of the log raft, were there not?

A. This side mostly of the “Melville,” yes, sir.

Q. I say, there was a considerable number of other boats moored alongside of the log raft?

A. Well, yes, of the log rafts. There were log rafts extending all along. [24—5]

Q. I mean, this same log raft?

A. There may have been a few more smaller ones up above there.

Q. As a matter of fact, it was quite a gala day, was it not, Mr. McGrath? A. Yes, sir.

Q. A great many people were down there to look at this launching? A. Yes, sir.

Q. It was quite an event.

Excused.

Mr. MOWRY.—I think that is all our case, your Honor. [25—6]

[Testimony of J. B. Yeon, for Defendant.]

J. B. YEON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FULTON.)

Where do you live, Mr. Yeon? A. Portland.

Q. What is your business?

A. I am in real estate mostly.

Q. You are, I believe, the owner of the Yeon Building here? A. Yes, sir.

Q. And how long have you known Mr. Callender?

A. About 20 years.

Q. Are you in any manner interested, directly or indirectly, in the Callender Navigation Company?

A. No, sir, not the least.

Q. Are you interested, directly or indirectly, in the steamer "Melville"? A. No, sir.

Q. Or were you ever? A. No, sir, never.

Q. No interest in it at all? A. No.

Q. You say you have known Mr. Callender how long? A. Twenty years.

Q. How have been your relations with him as to being social and pleasant, or otherwise?

A. Very—simply social.

Q. Friendly, eh? A. Yes, sir.

Q. Been friendly a good many years?

A. Yes, sir.

Q. I wish you would tell the Court, in your own way, Mr. Yeon, you can tell it far better than I can have it detailed by [26—7] questions, just what

(Testimony of J. B. Yeon.)

occurred down there on October 12th last, when Mr. Callender brought the steamer "Melville" alongside the dock at St. Helens.

A. Why, when the launching of the "Multnomah" was to take place, I got an invitation from the Hermann Lumber Company to witness the launching. So we drove from Portland in an automobile, and I was a little bit late in arriving at St. Helens. And the understanding was that when we got to St. Helens we would have boat capacity to take care of us, to land us at the launching place. Well, we got on the wharf, and there were a whole lot of people there waiting, and we waited, I guess probably fifteen or twenty minutes, and the report came that there would be no more boat. The launching was just about to take place, and it was getting too late. So while talking the matter over, we happened to spy Mr. Callender coming down with his boat—coming up, rather, upstream—I would judge about 200 feet from the wharf. Mr. Brady was along with me, and sighted him first, and he says, "Here is Mr. Callender." And he says, "Now, we will hail him in, and go up and see the launching." So I says, "All right." We had to shout quite loud for awhile, before we could get him to understand who we were. Of course, the minute he spied us he whirled right around and came back right alongside of the wharf. At that time there were a lot of people there, that had been waiting the same as we had been, and felt very much disappointed that they couldn't go. And the minute that the boat landed and we went to get

(Testimony of J. B. Yeon.)

on, they just simply poured right into the slip, and it was almost impossible to stop them. They got on the railing on the [27—8] side, and they dropped on to the top from the wharf, which was above the landing where we were getting on, and they got in in all kinds of shape; and that was about the extent of it. We all got on—couldn't stop them, practically.

COURT.—Was there any effort made to stop them?

A. Yes. When we first began to get on, Mr. Callender was there himself, close to the gang-plank; but they wouldn't take no for an answer at all; just simply shoved one another right on; and they didn't have a word to say.

COURT.—Couldn't he get the gang-plank in?

A. If he had, it would have been a very dangerous proposition. They were getting in as it was at the side. If he had undertaken to pull away, I don't know how the consequences might have been. You know how it is with a lot of people getting excited and anxious to go any place, especially in a case of this kind. After we got them on, we dropped up above and landed alongside of a raft, and witnessed the launching, which I suppose probably was about 20 or 25 minutes all told. Then the boat pulled back up to the wharf, and went on.

Q. You are familiar with the "Melville," are you?

A. Why, no more than I have seen the boat. This is the first time I have been on her, at this time.

(Testimony of J. B. Yeon.)

Cross-examination.

(Questions by Mr. MOWRY.)

How many people do you think got on there at St. Helens, Mr. Yeon?

A. Well, sir, it is pretty hard for me to tell really, because we all got on in such a rush, and after we got on we didn't pay any attention to one another, you might say; didn't notice. [28—9]

Q. Did you leave very many on the shore when you got away?

A. I don't think there was anybody left.

Q. You don't think there was anybody left?

A. I don't think so.

Q. Took on all that was there?

A. I think so. It seems they all got on.

Q. When you stopped and witnessed this launching, you were at the log raft, you say?

A. Yes.

Q. Did you stay on board? A. Yes.

Q. How about the others? Did the others stay on board?

A. Well, sir, I didn't notice anybody getting on and off. We were just on the side towards the launching of the boat, and I didn't notice what was going on on the other side at all. I cannot recall that there was any got off or on.

Q. You were on one side most of the time, were you?

A. Yes, sir, I always stood on the side next to the launching.

(Testimony of J. B. Yeon.)

Q. The side next to the raft would be out of view of the launching?

A. Yes, it would be just opposite.

Redirect Examination.

Q. Aren't you mistaken about not leaving anybody on the dock there? Wasn't there more people left on the dock than you took on board?

A. Well, sir, I cannot say that I noticed anybody there.

Q. You are not sure about that?

A. They all rushed down and came in. That is the last thing I can remember.

Q. You are not certain about leaving more people on the [29—10] dock, a good deal, than you took?

A. No, I couldn't say about that.

Excused. [30—11]

[Testimony of S. C. Morton, for Defendant.]

S. C. MORTON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FULTON.)

What is your business, Mr. Morton?

A. I am the auditor for the St. Helens Lumber Company and the St. Helens Shipbuilding Company.

Q. Where do you live? A. St. Helens.

Q. How long have you lived there?

A. About four years.

Q. Do you recall October 12th last?

A. Yes, sir.

(Testimony of S. C. Morton.)

Q. The incident that we are investigating here now? A. Yes, sir.

Q. Will you kindly tell the court, in your own way, what occurred there?

A. Well, we had made arrangements with the steamer "Modoc," after issuing all these invitations to people, to care for the crowd, but in some way the plans went wrong, and they didn't land a barge up there to land the people on at the shipbuilding yards; and she was very much delayed by that. So all the people from Portland and all around came down, and there wasn't any way to get over there except the "Modoc," which was making mighty few trips, and mighty slow between, so the dock just got loaded up with people. I was on the dock and trying to arrange to get them over to the shipbuilding plant. And after we had waited there, I suppose for an hour, why, I was on the lookout for the "Melville," knowing that she was coming up, and spied her coming up the river, and I ran and told my folks—I had my folks on the dock, too.

Q. Whom do you mean—your wife? [31—12]

A. Yes, I had my mother-in-law and my wife, and my sister-in-law and my two children, and my aunt—numerous friends from down at Astoria visiting us there. And I told them to stay on the dock there, and I would go and get Charlie Callender to come in there, if I could hail him. I edged my way out on the dock, right at the edge of the slip, and as he came, I recognized him and Herman Prael, and one or two others, and I hallooed to Callender to come

(Testimony of S. C. Morton.)

in, and also hallooed to Herman Prael if he wanted his mother to see it he better make Callender come in. So he turned and wheeled around, and they came up to the slip, which is, I guess, an angle of about 30 degrees that slip runs there on the Columbia River Packing Company's dock. She stuck her nose in there at the far side of the slip, the "Melville" did, which left her bow covering the slip, and kind of threw part of her house up to the upper part of the dock. Just at the time she got in there, as has been explained, there was a mad rush to get on there. I finally got, after the people had been pouring onto her a few minutes, I finally got my people on, with Herman Prael and Callender's assistance, I got all mine on. And then I bent my energies towards stopping some of them, but you couldn't well do it. I couldn't stop them anyhow. The only reason they stopped was because they got so thick there in front, there couldn't any more get on unless they climbed over somebody else's shoulder. They just had to push them away, take the boat away and leave them standing there.

Q. Mr. Callender had charge of the boat at that time?

A. Yes, he seemed to be giving orders around there.

Q. He was trying to stop them, was he? [32—13]

A. He was.

Q. How many people did they leave on the dock when they went away?

A. That is hard to say. There were a few people

(Testimony of S. C. Morton.)

that didn't get to see it, a few that were on the dock didn't get to see the launching, and after we left the "Modoc" made one more trip down there, and I presume she must have brought up 40 or 50. I know McCormack tried to get on the "Melville" when she left, and he caught the "Modoc" when it came back. I was under the impression the "Modoc" wasn't coming back. The word had been passed around that the "Modoc" wasn't coming back. Everybody was kind of wild.

Q. Did you leave more people on the dock than you took on board the boat there, than actually went on board the boat?

A. I would be pretty positive that there was just about that many left there.

Q. You didn't take all of them?

A. No, we did not.

Q. Was there a gang-plank thrown out?

A. No, there was no gang-plank at all. She just put her nose up alongside the slip, and then she kind of swung in alongside the dock. Her nose was up against the slip, and her sides were pretty close to the dock, so that the more daring of the men just jumped from the upper part of the dock to her deck.

Q. I wish you would describe to the Court the incident you described to me there one time.

A. I will describe that more as an amusing incident. There was a rancher down there who had some of his relatives, I think it was his niece, visiting. She had three children with her. And he also had his wife there. I said, "No more, no more," [32½—14] as

(Testimony of S. C. Morton.)

they came to get on. In the meantime he had dropped one of his kids on—I had helped it on. I said, “No more.” And his wife had gotten on somewhere else. So he said, “Well take this one anyway.” So he pitched it to me, and I handed it to its mother. That left one of them on the deck. I think he came on over on the “Modoc” then. I held them back all I could.

Q. What efforts were made by the crew of the steamer “Melville” to stop them?

A. Well, I heard Callender say, “No more come on.” I heard Pete Jordan, the captain, say, “That is enough. That is enough. Don’t any more get on.” That is when I took my cue. I thought I would help them out a little.

Q. I wish you would state to the Court whether or not, in your judgment, it was possible to have stopped them from getting on.

A. No, I really think unless a man had used force with his fist or something, I don’t think you could have stopped that crowd. You couldn’t have stopped me. That is a cinch. I would have gone or there somehow or other. I wanted to see the launching, too, and thought it was the last chance to see it. If you had pulled the boat away suddenly, there would have been a crowd there of people dropping into the river, because they were just a solid bank.

Q. I wish you would explain to the Court from what quarters they got on. If there was no gang-plank out, I wish you would explain how so many people got on there.

(Testimony of S. C. Morton.)

A. The dock is arranged, we will say, like this, and this place here is a slip runs down.

Q. How wide is the slip?

A. I judge it must be ten to twelve feet, possibly. I know [33—15] when the "Melville" stuck her nose in the slip there, that up to the forward part of her house, that slip, just about covered it, looked like to me, and left all her forward deck bare there, you see, just so people could get on. And when she stuck her nose into the slip, it being about eight feet below the top of the dock, and swung around a little bit, that threw her house pretty near even with the dock, so that those people that were not on the slip, they were in just as good shape to step right over from the dock to the top of the "Melville."

Q. Yes.

A. And I saw quite a few men come that way. I didn't see any women, because they weren't quite so daring. I judge the distance was about three feet, and they just jumped over, and caught hold of the railing.

Q. Did they get on board from any other quarter, if you know?

A. No, they got on the whole length of the side of the boat.

Q. Do you know how long it is? A. That boat?

Q. Yes.

A. I judge the "Melville" must be somewhere about 86 to 100 feet long.

Q. You have known Mr. Callender a good many years, have you not? A. Yes, sir.

(Testimony of S. C. Morton.)

Q. A personal friend? A. Yes, sir.

Q. And you spoke about Herman Prael? He was one of the passengers?

A. He came up from Astoria on the boat, and his mother was in Portland. She came down from Portland there, and was staying with us. She was going over to witness it, and she recognized [34—16] Herman, and he saw his mother there, and I got him to come in. I take the responsibility for getting them to come in. I hallooed at them once or twice.

Cross-examination.

(Questions by Mr. MAURY.)

You really went on there at the invitation of Mr. Callender, didn't you?

A. No, sir. It was a self-made invitation. I hallooed to him to come in there.

Q. He was perfectly willing to take you on?

A. Yes.

Q. You and your folks with his friends?

A. Yes, that is what we called him in for.

Q. Of course, there was no effort made to keep you people from getting on? A. No, sir.

Q. You say there was an effort made to keep some of the rest of them from getting on?

A. Yes, when they began to crowd over there too thick, Pete Jordan, the captain, hallooed, "That is enough," and then effort was made to stop them. By that time the whole crowd had got started, when they saw that boat coming in, and you just couldn't stop them.

Q. It was all a friendly affair, though, wasn't it?

(Testimony of S. C. Morton.)

There wasn't any trouble about it?

A. Oh, no, no, there wasn't any blows, anything like that.

Q. There wasn't any violence at all?

A. There was not.

Q. They came on in a friendly manner, didn't they? A. Yes, sir. [35—17]

Q. Everything was friendly?

A. I guess it certainly was.

Q. How many people do you think were left on the bank?

A. There must have been a hundred people left on that dock when we left there, and quite a few on the Mill Company's dock.

Q. Why didn't they get on?

A. I say they couldn't get on. We left some standing on the slip there. They just said that was enough.

Q. And pulled out?

A. They pulled out, and we shoved them all back, as many as we could. I helped to do it.

Q. Was any effort made to count the passengers there at St. Helens, as far as you know?

A. As far as I know, there was no effort made.
Examination by the COURT.

Q. How many people got on after the captain said, "That is enough"? Have you any idea?

A. I guess there must have been fifteen or twenty, or more, who got on after that. He hallooed that out for quite a while, and they were wedged in this slip down there, and they just kept on. I hallooed that

(Testimony of S. C. Morton.)

was enough, too, there. There must have been fifteen or twenty got on. I know that man threw his baby after I told him that was enough. I couldn't throw it back to him, so I just kept it there.

Q. About what proportion of those people got on over the deck and not through the slip?

A. Well, I would make a rough guess of one-third, anyway. I was busy helping my folks on, and I didn't think I would ever [36—18] have to try to remember this again, and I just noticed a lot of them, especially the men, going on from the main dock. And we took all the women in through this way.

Excused. [36½—19]

[Testimony of C. H. Callender, for Defendant.]

C. H. CALLENDER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Fulton.)

Mr. Callender, just state what your business is.

A. Well, I am the secretary and general manager of the Callender Navigation Company.

Q. And the Callender Navigation Company is the owner of this steamer "Melville" here?

A. They are.

Q. Are you a master?

A. No, I am not. Captain Jordan was the master.

Q. I know; but you have been, have you not?

A. I have been, yes.

Q. You had carried a license?

A. I had carried a special license at the time they used to issue special licenses to an owner to operate

(Testimony of C. H. Callender.)

their own boat I carried it; but when that law was repealed, I never took out a regular captain's papers.

Q. How long have you been acquainted with the "Melville"?

A. Ever since she was built, about eight years ago.

Q. Give her size.

A. She is 89 feet long, 20 feet beam, 7-foot hold.

Q. Is she a good staunch, seaworthy boat?

A. She is; very heavy-built tug-boat.

Q. Very heavily built tug-boat? A. Yes.

Q. Used as a tug-boat mostly? [37—20]

A. Used as a tug-boat principally. We carry a passengers license just for accommodation. We have no passenger run and don't make a business of carrying passengers. We use her just for a pleasure boat occasionally. During our regattas down there, we like to take our friends out, and once in a while a regatta up at Cathlamet or some place, we like to take the boys out for a little fun—once in a while my wife gives a party; so we carry a passenger license on her for that reason.

Q. Who was captain of this boat that day?

A. Captain Jordan.

Q. Where is he now?

A. Well, he is aboard of the boat now, wherever she is.

Q. Why isn't he here?

A. Well, we couldn't reach him. The boat left Astoria three or four days ago on a long tow, and she hadn't gotten back last night when I left.

Mr. FULTON.—If your Honor thinks it advisable to have Captain Jordan here, we will get him here,

(Testimony of C. H. Callender.)

but they start out with this boat your Honor, and they are gone for a week.

COURT.—Gone out to sea?

Mr. FULTON.—He was captain of the boat at that time.

COURT.—Do they go out to sea?

Mr. FULTON.—No. No, he is on the Columbia River. But they start out with these tows, and they are gone for four or five days, and get along up, and we cannot get them here. We expected to get him here, and if your Honor or they think they should have Captain Jordan here, we would be very glad to have him.

A. During this high water and big freshet in the river, it is [38—21] all we could do to keep the sawmills going with logs. We couldn't—well, we could possibly, but I didn't like to take the boat off the job, because it takes all our boats to keep the upper mills going.

Q. I wish you would detail to his Honor here the facts pertaining to the taking and carrying of these passengers with which you are charged. Just explain it.

A. Well, I invited a few of my own friends in Astoria to make that trip, to go up and see the launching of this big ship. As long as it had been the first one that was launched in the Columbia River, it was quite an event. I think there were about 12 of 15 of us took the boat in the morning, and figured on getting up there possibly an hour before the launching—figured on looking around the

(Testimony of C. H. Callender.)

mill. We were a good deal longer coming up than we figured on. There was a pretty good current in the river. When we arrived at St. Helens dock, was going by there, we realized it was just about the time the ship was to be launched. Going by the wharf there, we saw quite a number of people on the wharf, and we heard somebody hallooing. And I looked over there and saw several of my friends there—Mr. Morton, Mr. Yeon and Mr. Brady, and Mr. McCormack, and two or three people from Astoria, Mr. Halterman and several others. So I sung out to the captain to swing around and make a landing, and we would pick those people up. As we went in there was a wide slip, possibly ten or fifteen feet wide. As we started to go in there, these people began to jump into that slip. We ran the nose of the boat in there, and Mr. Morton was pretty well back of the crowd with his folks, and in trying to get them through the crowd, and get them down there, [39—22] of course everybody began to jump aboard. I tried to hold them back. They all hallooed there was no other boat—“We can’t get up there.” In our efforts to get Mr. Yeon and Mr. Brady and Mr. Morton and the ladies aboard, this crowd kept piling in. I didn’t realize there was anybody coming on top of the boat till after we started to back away, I saw a whole crowd of them on the boat, jumping over on top of our house. Of course, we tried to stop them just as soon as I saw the rush. But when they started to crowd into the slip there like a lot of cattle, people on the back end

(Testimony of C. H. Callender.)

of the slip shoving the front ones aboard the boat, if the boat had pulled away very suddenly it would have pulled them all overboard. As soon as we stopped and got our boat away, we backed right away. We didn't have lines out or anything else. We just had her nose up against the dock. We stopped and backed her away as soon as we could, till they realized they was going to get overboard, then they hallooed "quit." We proceeded up close to the dock and along close to the log rafts. I don't think any of the time we was more than two or three lengths of the boat away from the shore. We tied up to the log raft right across from where the launching took place. As soon as the steamer was in the water we went right back to the dock and put this crowd off. I don't think it was over a quarter of a mile from the wharf up to where the ship was launched. It possibly might be a little more, but I don't think it is.

(Examination by the COURT.)

Q. You took the same crowd back that went over?

A. Yes, the same crowd went back. I don't think anybody got off. Of course, there were a few people, after the boat tied [40—23] up to the log raft, got off. I did. I was in the lumber business—while I was waiting there for the launching, I got off on the raft, and several people got off.

Q. Were there any people on the raft?

A. I think there were. There was a lot of these little fishing boats and pleasure boats, and two or three rafts of logs all up and down the slough, quite

(Testimony of C. H. Callender.)

a number of boats tied up there, and people walking around on the raft, as I remember.

Q. Do you remember whether any more people got on your boat?

A. No, I am satisfied there wasn't anybody got on there. I don't think they did.

Redirect Examination.

Q. Was there any charge made for any of these people?

A. No charge at all. We were simply out for a picnic.

Q. Would you have permitted these people to have gotten aboard, could you have avoided it?

A. I should certainly not. I didn't want them aboard there. We had a little party of our own, and we had some refreshments served in the cabin there, some sandwiches and things. We were just having a little party. I didn't want any strangers aboard the boat. I didn't know these people.

Q. They were not friends of yours?

A. I didn't know any of them, with the exception of just that few that I went in there to pick up.

Q. They were your old-time friends?

A. Yes, personal friends, and I didn't want to see them left out on the dock and miss the launching, after they had taken the trouble to come down from Portland in an automobile.

Q. This was a private picnic you were having in your own boat? A. Yes. [40½—24]

Q. You say you had refreshments on there?

A. We had a little—we had to have a little lunch,

(Testimony of C. H. Callender.)

you know; it was a long trip.

Q. You had those for your own personal use?

A. We had those for our own personal use.

Q. And it was only about a quarter of a mile run over to where the launching took place?

A. I would estimate about that. It might be a little bit more than that, but I don't think so.

Mr. FULTON.—I assume your Honor is familiar with the waters around St. Helens.

A. It is in a slough. It is not in the main river. From the St. Helens dock up to where we took these people, up to the shipbuilding plant, it is just a narrow slough. I don't think the slough is over a quarter of a mile wide.

Q. How is it protected against storms?

A. Absolutely no chance for any rough water in there. It is just like a millpond in there, just like a lake, up from the St. Helens boom to the mill, extends up clear to the shipbuilding plant, there were rafts moored clear along there. I don't think at any time we steered more than a couple of boat-lengths away from those logs. There was absolutely no danger at all.

Q. How many people could your boat at that time safely have carried?

A. We could safely put 200 people on that boat, without crowding her very much. Big open-deck tug-boat—she has open deck all the way around her. Her stern is a big open stern and her bow the same. And then on top of her house there is lots of [41—25] room. I think 200 people could be carried.

(Testimony of C. H. Callender.)

(Examination by the COURT.)

Q. You don't use it for passengers?

A. No, sir, I don't use it for passengers—never have. Never have had her on passenger run. She is a very finely built boat; nice cabin on the boat. I am proud to invite my friends to take a little trip with me once in a while. That is the reason we have a passenger license for her.

Q. What kind of a day was it?

A. It was about three o'clock in the afternoon.

Q. What kind—I mean what was the weather?

A. Fine day.

Q. Any wind?

A. Not a particle. It was a fine bright day and perfectly smooth.

Cross-examination.

(Questions by Mr. MOWRY.)

How many people do you think you left on shore there after the boat left?

A. It is pretty hard to make an estimate of how many were left on the shore. I know we left a big crowd on the dock there. It is pretty hard to estimate the number of people in a crowd. You take a bunch of people out on the street, and you couldn't guess their number.

Q. You wouldn't want to offer a estimate?

A. No.

Q. Would you think over 50?

A. I think there would be at least that or more.

Q. Do you think there would be 100?

A. I didn't pay any particular attention. I was

(Testimony of C. H. Callender.)

out on the [42—26] launch, and there were lots of people up on top of the boat as I got her in the slip.

Q. Those people that were left back there on the shore were men, women and children, were they?

A. Yes, surely.

Q. And the people that got on board were men, women and children?

A. The people that got on board were men, women and children.

Q. There were about as many women as there were men, weren't there? A. I should judge so; yes.

Q. And quite a few children?

A. A few children, yes.

Q. What effort did you make to stop them? There wasn't any violence used?

A. No violence. I just simply told people, "This is a private party. We are not a passenger boat, and we don't want to take anybody up there." But it had about as much use as throwing water on a duck's back. They didn't pay any attention to it—just came clambering up the side.

Q. How many people do you think were on when you pulled out?

A. I don't have the slightest idea.

Q. At that time how many did you think?

A. I didn't know. At the time we started to stop the people getting aboard, I didn't think we had too many people on the boat, or I certainly would have stopped.

Q. You didn't think you had more than 75 on?

(Testimony of C. H. Callender.)

A. No, I didn't know we had. I didn't know any were getting on top back there.

Q. When you got over to the log raft, you went up close so [42½—27] people could get off on it?

A. We went up and tied up to the log raft.

Q. You got off on the raft yourself?

A. I got off on the raft myself, yes.

Q. A few others got off?

A. A few others of us got off.

Q. At that time you could have forced these people to get off?

Q. We could have forced these people to get off on the log raft. We wouldn't want to put a lot of people that wasn't accustomed to walking on logs out on a log raft.

Q. Wasn't the log raft up on an island?

A. The log raft was moored to dolphins, piles, away from the shore; those piles that were driven out there.

Q. People could go from the log raft over to the island, couldn't they?

A. They couldn't without a boat.

Q. Your boat, you say, you think could safely carry 200 people? A. I think so, very safely.

Q. Could have been 200 people on board, and you wouldn't have considered there was any danger of sinking? A. No, sir, not a bit.

Q. Or capsizing? A. No, sir.

Redirect Examination.

Q. Speaking of this log raft, Mr. Callender, you are a logger? A. I am.

(Testimony of C. H. Callender.)

Q. I wish you would state to the court whether or not a person that is unused to walking on these rafts, or log rafts such as this was,—would it be safe for them to attempt it?

A. It certainly would not. People that are not accustomed to [43—28] going on sawlogs have no business getting on a log raft. They took big chances of going overboard.

Q. Supposing you had forced these people off on this log raft, what is your judgment it would have been?

A. It would have been in my judgment a very unwise thing, been unsafe. Lots of them would be liable to jump in the river.

Q. Would have been drowned?

A. We didn't want to drown anybody.

Q. Not that day? A. No.

(Examination by the COURT.)

Q. What effort did the captain make?

A. The captain was up in the pilot-house, and he sang out to me, as soon as he saw this crowd coming on—he says, “Look here, you are getting too many on here. Stop them as soon as you can.” I told him to back her away slowly, and see if we can check them up a little bit. He commenced to back up slow, so we could convince people we were leaving there. The people on the back end of the dock couldn't see—they kept shoving. The people in front were powerless to help themselves. They either had to go in the river or jump aboard the boat. The crowd on the back of the slip was pushing so

(Testimony of C. H. Callender.)

hard—a crowd of people like that.

Q. When you took out a license, was it your purpose to take out what the boat would carry?

A. No, sir.

Q. Or what did you intend to take out?

A. The license was taken out just for convenience, and what we thought we could accommodate in our cabins. The inspectors [44—29] won't give you a license for people to carry on deck. You have got to have passenger accommodations, so in case of storms you can put your passengers all inside of your house. This boat has a very small house compared to the size of the boat. It is a big open-deck boat.

Redirect Examination.

Q. Was it your intention when you landed there at the dock to take—how many people did you intend to take on board?

A. I just intended to take our friends.

Q. About how many of them were there?

A. I suppose there were fifteen or twenty there altogether. Not over that.

Recross-examination.

Q. About the captain—I didn't quite get that. You said the captain sung out?

A. He sung out to me, yes. He was up in the pilot-house. He couldn't see how many people were getting aboard down there, but he realized there was quite a crowd coming, and he sung out to me to stop those people; there was enough.

Q. Did he make any objection to pulling out with the crowd on?

(Testimony of C. H. Callender.)

A. No, he didn't make any objection to pulling out with the crowd on, because he didn't realize that we had more than we were entitled to.

Q. He didn't think you had on more than you were entitled to?

A. No, he didn't have time to go around and look around the boat. I don't suppose that he knew that there was over the crowd.

Q. (Redirect.) I understood you to say that it would have been absolutely unsafe to have pulled the boat out until the people [45—30] behind realized that the boat was pulling out?

A. It certainly would have been, because if we had those people on the front of that slip would have gone overboard. There was no way to protect them, and the people behind were shoving and crowding and yelling, you know.

Excused. [46—31]

[**Testimony of Michael F. Brady, for Defendant.**]

MICHAEL F. BRADY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FULTON.)

Where do you live, Mr. Brady?

A. 742 Thompson Street, City of Portland.

Q. How long have you lived in Portland?

A. Oh, I lived here for the last forty years, I guess.

Q. What is your business?

A. I am in the railroad supply business.

Q. Where do you office?

(Testimony of Michael F. Brady.)

A. In the Yeon Building.

Q. Are you acquainted with Mr. C. H. Callender?

A. I am.

Q. How long have you known him?

A. I have known Mr. Callender the last six or seven years.

Q. Were you at St. Helens last October, at the time the steamboat "Multnomah" was launched by the St. Helens Shipbuilding Company? A. Yes.

Q. I wish you would explain to the Court here just what occurred there about the passengers getting on the boat, and all about it; whether or not the boat could have prevented it and all that. Just explain generally to his Honor.

A. I was invited down with Mr. Yeon in the machine to witness the launching of that boat. And after we arrived down there they told us that all the boats had gone to the launching and there was no more boats going up there. And while a number of our party were standing on the dock, why, Captain [47—32] Callender's boat came along, and we hallooed to them out in the stream. He turned around and recognized us, and he wheeled around and came in to the dock. When he got up in there, of course, we were glad to get up there and see the launching. And they got aboard—quite a number of people got on there when we got on. I don't know whether they were all friends of Mr. Callender's or not. And we went up there. That is all I know.

Q. Just describe to the Court what took place there when the boat landed.

(Testimony of Michael F. Brady.)

A. Oh, when the boat landed there was a great rush to get on this boat. Gee—they were running in from up above, and below, and all over. I never saw such a rush, there getting on the boat.

Q. Did you observe any attempt, the attempt Mr. Callender made to stop them?

A. Mr. Callender was on the lower deck, and he was hallooing to the people not to come on, no more; just kept hallooing until after the boat was pulling out there.

Q. When this rush was on, I wish you would state to the Court whether or not, in your judgment, it would have been safe to have pulled the boat away while the jam was there.

A. Well, if they had pulled the bow of the boat while the gang-plank and that whole crowd was there, they would all have gone down between the boat and the dock there.

Q. The crowd behind?

A. Yes. I would judge there was quite a number on the dock left when the boat pulled out, too.

Q. Quite a number on the dock left?

A. Yes. [48—33]

Q. I wish you would state to the Court your honest opinion as to whether or not the officers of this boat could have prevented these people from going on there.

A. Well, they did. Captain Callender hallooed to them to get off the gang-plank, when they were pulling out there. That is the reason there were quite a few left on the dock there.

(Testimony of Michael F. Brady.)

Q. There was no gang-plank put out, was there?

A. I think there was. I am not sure. I think there was a gang-plank.

Q. You think they couldn't have been prevented?

A. No, I don't think it could be.

Q. That is, those that got on board you couldn't have kept them off?

A. Yes. Oh, no, you couldn't have.

Cross-examination.

(Questions by Mr. MOWRY.)

There wasn't any force used to keep them off, was there? A. No.

Q. None whatsoever?

A. I heard Mr. Callender hallooing to keep back.

Q. Just to keep back? A. Yes.

Q. Of course, if he had used force, he might have been able to keep some of them off, couldn't he?

A. Well, if he had hauled around that way, they were getting in where the bow was, they would have gotten into the river, I think, the way the crowd rushed aboard there.

Q. How many people do you think were left on the bank? [49—34]

A. I would judge there was forty or fifty people on that dock when that boat pulled out.

Q. Men and women?

A. Men and women, yes.

Q. Were there most men or women?

A. I didn't notice. The crowd was disappointed. Everybody was disappointed down there.

Q. And there were men and women both that got

(Testimony of Michael F. Brady.)

on the boat there, were there?

A. Oh, yes; yes.

Q. Did you get off over at the log raft?

A. No, I should say I wouldn't dare to get off there. If you got off on that log raft, the raft was away out from shore.

Q. You stayed on the boat, yourself? A. Yes.

Redirect Examination.

Q. What character of force would have been necessary, in your judgment, to have stopped that rush of people?

A. I don't know. You would probably have to get a club at them when the boat got in there. They were all disappointed. Everybody wanted to go up there, you know.

Excused. [50—35]

Mr. FULTON.—I will say, your Honor, we don't have the captain, and I trust your Honor will not consider that as any evidence against us.

COURT.—Of course, the Court understands the conditions under which the captain is not here.

Mr. FULTON.—We have a large number of other witnesses, but I don't think it is necessary to take up the time of your Honor. We can call forty on that. I think that is our case.

COURT.—Have you anything on rebuttal?

Mr. MOWRY.—We have no further witnesses, your Honor, no. [51—36]

COURT.—In this case there is no doubt but what there were more passengers carried than the boat

(Testimony of Michael F. Brady.)

was licensed to carry; but when the boat left with the passengers, it is not clearly shown that the officers knew that they had an overload, or more passengers on the boat than the boat was licensed to carry. But I think the crux of this case is simply this: Whether the officers of the boat and the owners of the boat, or the company which owned the boat, wilfully intended to violate the law. It appears to me that there was no intention here to violate the law. In the first place, there was no intention of taking on any passengers, only a few who, together with those that were on the boat, would not amount to half the number of people that the boat was licensed to carry. But when the boat landed, or rather when the boat touched so those passengers could come aboard, people came in great crowds, and they could not be kept back. And furthermore, while the persons on the bow of the boat were attempting to keep off those coming down the slip, people were getting on over the deck, and the officers had no knowledge of that fact, and there was no way of keeping count of the people that came on board, either on deck or below. And when the boat got away, it is very evident that, had it landed again, it would have had the same trouble in keeping back passengers, and probably would have had more on in a very short time. Everybody knows the persistence of a great crowd of that kind. It is hard to control them. I think there was no intention on the part of these people to violate the law, and consequently I will dismiss the complaint. [52—37]

[Endorsed]: # 5920. United States vs. Callender Navigation Co. Testimony. Filed Nov. 28, 1913. A. M. Cannon, Clerk. By G. H. Marsh, Deputy.

[Decree of Dismissal.]

No. 5920.

THE UNITED STATES OF AMERICA,

vs.

The Steamer "MELVILLE."

This cause came on regularly for trial at this time, Mr. Mowry, Assistant United States Attorney, appearing for the plaintiff and Mr. Fulton appearing as proctor for the defendant; whereupon, upon motion of Mr. Fulton to strike certain parts of the answer, it is ordered that said motion be and the same hereby is granted, and thereupon H. F. McGrath was sworn and examined on the behalf of the Government, and thereupon Government rests, and thereupon J. B. Yeon, S. C. Morten, G. H. Callander and M. F. Brady were sworn and examined as witnesses on behalf of the respondent, and thereupon respondent rests and evidence closed, and thereupon, after argument of proctors for respective parties, cause submitted and thereupon the Court being fully advised in the premises, it is ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed. [53]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Libellant and Appellant,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Defendant.

CALLENDER NAVIGATION COMPANY, a Cor-
poration,

Claimant and Appellee.

Notice of Appeal.

To the Claimant Callender Navigation Company, a
Corporation, and G. C. Fulton, Esquire, Proctor
Therefor.

You will please take notice that the libellant above
named hereby appeals from the final decree made and
entered herein on the 25th day of June, 1913, to the
next United States Circuit Court of Appeals for the
Ninth Circuit, to be holden in and for said Circuit,
in the City of San Francisco, California.

Respectfully,

CLARENCE L. REAMES,

United States Attorney.

ROBERT R. RANKIN,

Assistant United States Attorney.

Dated at Portland, Oregon, this 12th day of De-
cember, 1913. [54]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

Libellant and Appellant,

vs.

The Steamer "MELVILLE," Her Tackle, Apparel,
Furniture, etc.,

Defendant.

CALLENDER NAVIGATION COMPANY, a Cor-
poration,

Claimant and Appellee.

Assignments of Error.

The above named libellant and appellant hereby assigns error to the decree of the District Court of the United States for the District of Oregon, in the above-entitled cause, as follows:

I.

The Court erred in decreeing that the libel of information herein be dismissed.

II.

The Court erred in not decreeing that the libellant herein have judgment for the penal sum of Five Hundred Dollars as prayed for in said libel, and costs.

III.

The decree of said Court is contrary to the law and evidence herein.

Dated at Portland, Oregon, this 17th day of December, 1913.

ROBERT R. RANKIN,
Assistant United States Attorney. [55]

**Certificate of the Clerk of the United States District
Court to the Apostles.**

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing and hereunto annexed — pages contain a full true and correct transcript of the record in said District Court, made pursuant to the Rules of the Circuit Court of Appeals in Admiralty cases, and the praecipe filed by Robert R. Rankin, Assistant United States Attorney.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26 day of December, 1913, and of the Independence of the United States, the one hundred and thirty-seventh.

[Seal]

A. M. CANNON,
Clerk of said District Court. [57]

[Endorsed:] No. 2362. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Callender Navigation Company, a Corporation, Claimant of the Steamer "Melville," Her Tackle, Apparel, Furniture, etc., Appellee. Apostles. Upon Appeal from the United States District Court for the District of Oregon.

Received and filed December 29, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

IN ADMIRALTY.

UNITED STATES OF AMERICA
Libellant and Appellant

vs.

THE STEAMER "MELVILLE," her Tackle,
Apparel, Furniture, Etc.
Defendant

CALLENDER NAVIGATION CO., a Corpo-
ration,
Claimant and Appellee.

Brief of Appellant.

STATEMENT OF FACTS.

This is a libel *in rem*, in admiralty, against the Steamer "Melville," to recover a penalty incurred by carrying more passengers than permitted by her certificate of inspection.

The facts constituting the government's case are

practically undisputed: On the 12th day of October, 1912, the certificate of inspection, issued to the river tugboat "Melville," under Section 4464 of the Revised Statutes of the United States, allowed that boat to carry the total number of 75 passengers. The official machine count of the deputy collector and chief inspector of customs of the Port of Portland, showed that on said date, the "Melville" carried one hundred and nineteen passengers. This was a violation of Section 4465 Revised Statutes of the United States, and Section 4499 thereof provides a penalty of \$500 for each such violation. To recover this penal sum said libel was filed by the United States.

The answer to this libel denied carrying more than the licensed number of passengers, but the testimony taken at the trial, shows conclusively, and the trial court found that the excess number of passengers was carried. The defense sounds in an excuse of the violation by reason of lack of intent and knowledge on the part of the captain of the boat and manager of the claimant company by reason of the following alleged extenuating circumstance:

The "Melville," Captain Jordan, with C. H. Callender, secretary and general manager of the claimant company, and his party aboard, was bound from the city of Astoria to the town of St. Helens, both places being on the Columbia River, in Oregon, to attend a launching. As the "Melville" was passing the wharf at St. Helens, on its way to the docks where the launching was to occur, friends of Mr. Callender, recognizing his boat, attracted his attention, and on recognizing them,

Mr. Callender ordered the captain to land and pick the people up.

There was a large crowd on the wharf, anxious to attend the launching and as the "Melville" lay at the wharf unattached, with her prow in the slip, the crowd, probably unaided by a gang plank, came on the boat over the prow and from the wharf onto the upper deck.

It was a friendly crowd and when the captain observed that many were coming on board, he called out: "That's enough. Don't any more get on." Mr. Callender and Mr. S. C. Morton, a friend who had just come aboard, called out in similar effect and not more than fifteen or twenty persons got on after the warning. The crowd was anxious but orderly; no violence was used by any party and no effort made to keep the crowd off the boat other than by verbal demands.

The captain of the boat as well as the manager of the company, made no objections to pulling out into the stream with their passengers, consisting of men, women and children, because they did not suppose they had an excessive number, or else, as Mr. Callender states: "I certainly would have stopped."

The "Melville" steamed up stream to the docks and rested broadside along a log raft onto which many of the boat's passengers went to there witness the launching. The "Melville" remained here some twenty or twenty-five minutes, and after the new vessel was in the water, those on the rafts, without even verbal opposition, again boarded the "Melville" and were carried back and landed at the wharf.

The Court in its opinion said: "But I think the

crux of this case is simply this: Whether the officers of the boat and the owners of the boat, or the company which owned the boat, wilfully intended to violate the law.
 * * * I think there was no intention on the part of these people to violate the law, and consequently I will dismiss the complaint."

Quere 1. Is intention or knowledge of the wrongdoer an element of this offense?

Quere 2. Is the "Melville" liable to a penalty for violating a federal law?

SPECIFICATION OF ERRORS.

The errors specified as reasons for this appeal are that:

I.

The court erred in decreeing that the libel of information herein be dismissed.

II..

The court erred in not decreeing that the libellant herein have judgment for the penal sum of five hundred dollars and costs, as prayed for in said libel, because it is conclusively proven that the defendant violated a law of the United States.

III.

The decree of the court is contrary to the evidence in that a violation of the law is conclusively proven and admitted by the trial court, and the decree is contrary to law in that it is not necessary for the Government to prove unlawful intent and knowledge of unlawful acts

in *mala prohibita* offenses, made such by a statute intended to protect life and property.

POINTS AND AUTHORITIES.

I.

The following statutes make the act charged, an unlawful one, fix the penalty and define the method of recovering the same.

(a). Section 4464 of the Revised Statutes of the United States, reads as follows:

“The inspectors shall state in every certificate of inspection granted to steamers carrying passengers, other than ferry-boats, the number of passengers of each class that any such steamer has accommodations for, and can carry with prudence and safety.”

(b). Section 4465 of the Revised Statutes of the United States reads as follows:

“It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed.”

(c). Section 4499 of the Revised Statutes of the United States reads as follows:

“If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this Title, the owner shall be liable to the United States in a penalty of five hundred dollars

for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.”

(d). The penalty allowed by Section 4465 R. S. is not exclusive of the penalty allowed the Government under Section 4499.

“The Idaho,” (D. C. Ore. 1886) 29 Fed. 187, 190.

II.

The object, and therefore the purpose and intent of the above enactments, has been legislatively and judiciously declared to be: To protect the lives of passengers and of the crew and of property on the particular vessel, as well as the lives and property on other boats and wharves related to the particular vessel by its navigation.

(a). The object, purpose and intent of the legislature in passing this law is shown in congressional debates on an “Act to provide for the better security of life on board vessels propelled in whole or in part by steam,” etc.

Congressional Globe 41st Congress 3rd Sess.
Part 2, 1870-1871, pp. 1321-1328, and 1628.

(i.) The legislative history of a statute may be examined to enable the court to construe it.
Lewis Pub. Co. vs. Morgen, (1912) 229 U. S. 288, 324.

(b). In generally construing the provisions in Title LII Revised Statutes of the United States, Regulation

of Steam Vessels, of which the above sections are a portion, the courts have given effect to the legislative object, purpose and intent.

The Hazel Kirke, (C. C. E. Div. N. Y. 1885)
25 Fed. 601, 607.

The City of Salem, (D. C. Ore. 1889) 38 Fed.
762, 763.

United States vs. Nash. et el., (D. C. Ky. 1901)
111 Fed. 525, 526.

Hartranft v. DuPont (1886) 118 U. S. 223, 226.

III.

The act of overloading a steamer is not a true "crime" under this statute.

"The Idaho" (D. C. Ore. 1886), 29 Fed. 187, 191-2;
and the procedure is in admiralty and not in crimes,
"The Ben R." (C. C. A. 6th 1904) 134 Fed. 784, 785.

But the statute, in plain words, makes it an offense to carry passengers in excess of the number allowed by the inspector's certificate, and does not make "knowledge" or "intent" (or use words implying like meaning) elements of the offense. Section 4465, R. S.

Authorities on similar statutes hold such offenses are *mala prohibita* and in the nature of police regulations, where the doing of the act is punished but "knowledge" or "intent" need not be proved.

United States vs. Curtis (D. C. N. Y. 1883) 10
Fed. 184, 186.

United States vs. Leathers (D. C. Nev. 1879)
26 Fed. Cases No. 15,581.

United States vs. Stopello (1904) 8 Ariz. 461,
s. c. 76 Pac. 611, 612.

United States vs. Harmon (D. C. Kan. 1891)
45 Fed. 414, 421.

And under the statute in question it has been adjudged that "knowledge" of the unlawful act is not an element to be proved to constitute the offense.

"The Idaho" (D. C. Ore. 1886) 29 Fed. 187, 191.

The necessity of proof of "knowledge" or "intent" of the offense is negatived by this very act which makes the master of the boat liable to a penalty for failure to keep a count of the passengers through either "negligence or design."

Sects. 4467-4468 Rev. Stat. as amended.

The sole question is one of facts as implied in the case

"The City of Lowell" (C. C. 2nd, 1913) 204 Fed.
271, 272.

IV.

Courts have no legislative function but rather endeavor to ascertain the will of the legislative body as expressed in the statute.

United States vs. Goldenberg, (1897) 168 U. S.
95, 103.

And where the intent and purpose of Congress are clear, the Courts must yield to that intent and purpose, even in hard cases, for with the effect of the law the Court has nothing to do.

American Railroad Company of Porto Rico vs.
Birch, (1912) 224 U. S. 547, 557.

Suey vs. Backus, (1912) 225 U. S. 460, 476.

And having ascertained the will of Congress, its purpose must be executed, unless the statute is found to be

inconsistent with the Supreme Law of the Land; Courts cannot mold a statute simply to meet their views of justice in particular cases.

Louisville & Nashville R. R. Co. v. Mottley,
(1911) 219 U. S. 467, 474.

ARGUMENT.

That the "Melville" carried passengers in excess of the licensed number is undisputed by the evidence and found as a fact by the trial court in its opinion. Therefore, according to the Government's theory herein, the offense alleged was committed.

The defense hereto is that there was an unmanageable crowd, over which the officers had no control, clamoring to secure passage on the boat which as soon as it could safely do so, pulled into the stream with the officers not knowing that they had on board more than the licensed number of passengers, and without intention to violate the law.

1. But the testimony concludes as follows:

THE CROWD WAS NOT UNMANAGEABLE.

This conclusion is reached entirely from the testimony of defendant's witnesses:

MR. MORTON stated (p. 37 Apostles):

"Q. It was a friendly affair, though, wasn't it? There wasn't any trouble about it?

"A. Oh, no, no, there wasn't any blows, anything like that.

"Q. There wasn't any violence at all?

"A. There was not.

"Q. They came on in a friendly manner, didn't they?

"A. Yes, sir.

"Q. Everything was friendly?

"A. I guess it certainly was."

MR. CALLENDER, the general manager of the claimant company, stated (p. 47 Apostles) :

"Q. And the people that got on board were men, women and children?

"A. The people that got on board were men, women and children.

"Q. There were about as many women as there were men, weren't there?

"A. I should judge so, yes.

"Q. And quite a few children?

"A. A few children, yes.

"Q. What effort did you make to stop them? There wasn't any violence used?

"A. No violence. I just simply told people, 'This is a private party. We are not a passenger boat, and we don't want to take anybody up there.' But it had about as much use as throwing water on a duck's back. They didn't pay any attention to it—just came clambering up the side."

MR. BRADY, virtually concludes there was no resistance to the crowd's approach other than oral admonitions. (p. 54 Apostles) :

"Q. There wasn't any force used to keep them off, was there?

"A. No.

"Q. None whatsoever?

"A. I heard Mr. Callender hallooing to keep back.

"Q. Just to keep back?

"A. Yes.

"Q. Of course, if he had used force, he might have been able to keep some of them off, couldn't he?

"A. Well, if he had hauled around that way, they were getting in where the bow was, they would have gotten into the river, I think, the way the crowd rushed aboard there."

THE BOAT'S OFFICERS COULD HAVE CONTROLLED THEM.

The boat could have stayed at the wharf until the excess number left the boat, as MR. CALLENDER suggests. (p. 47 Apostles) :

"Q. How many people do you think were on when you pulled out?

"A. I don't have the slightest idea.

"Q. At that time how many did you think?

"A. I didn't know. At the time we started to stop the people getting aboard, I didn't think we had too many people on the boat, or I certainly would have stopped."

Or with some inconvenience, which certainly cannot be urged as an excuse for a violation of the law, MR. CALLENDER admits some passengers could have been kept on the log raft (p. 48 Apostles) :

"Q. When you got over to the log raft, you went up close so people could get off on it?

"A. We went up and tied up to the log raft.

"Q. You got off on the raft yourself?

"A. I got off on the raft myself, yes.

"Q. A few others got off?

“A. A few others of us got off.

“Q. At that time you could have forced these people to get off?

“A. We could have forced these people to get off on the log raft. We wouldn't want to put a lot of people that wasn't accustomed to walking on logs out on a log raft.”

At the estimate of the defense there were few who got on after the verbal admonition, so few in fact that the boat had an excess passenger list before the admonition was given:

MR. MORTON states (p. 38 Apostles):

“Q. How many people got on after the captain said, ‘That is enough?’ Have you any idea?

“A. I guess there must have been fifteen or twenty, or more, who got on after that. He hallooed that out for quite awhile, and they were wedged on this slip down there, and they just kept on. I hallooed that was enough, too, there. There must have been fifteen or twenty got on. I know that man threw his baby after I told him that was enough. I couldn't throw it back to him, so I just kept it there.”

THAT THERE WAS NO KNOWLEDGE AND INTENT OF VIOLATION.

While, as MR. CALLENDER states (p. 47 Apostles):

“Q. You did not think you had more than 75 on?

“A. No, I did not know we had. I did not know any were getting on top back there.”

Common sense concludes it is his business under

this law to know how many passengers are taken on board his boat.

A constructive intent (if it should ever be necessary to find intent) is shown by the pulling into the stream without objection to the passenger list.

MR. CALLENDER states (p. 50 Apostles):

“Q. About the captain—I didn’t quite get that. You said the captain sung out?

“A. He sung out to me, yes. He was up in the pilot-house. He couldn’t see how many people were getting aboard down there, but he realized there was quite a crowd coming, and he sung out to me to stop those people; there was enough.

“Q. Did he make any objection to pulling out with the crowd on?

“A. No, he didn’t make any objection to pulling out with the crowd on, because he didn’t realize that we had more than we were entitled to.

“Q. He didn’t think you had on more than you were entitled to?

“A. No, he didn’t have time to go around and look around the boat. I don’t suppose that he knew that there was over the crowd.”

2. And the legal conclusions are as follows:

The purpose of this act, as declared in the title thereto is: To provide for the better security of life and property on steam vessels. The debates in Congress conclude an opinion to such effect. The courts of the land have reiterated it in the following excerpts from their decisions:

BENEDICT, J., in *The Hazel Kirke*, 25 Fed. at page 607, says:

“The object and effect of a provision forbidding the transportation upon a steamboat of passengers in excess of her capacity is plain. It is a regulation respecting the load to be carried by the vessel, and it will hardly be contended, I think, that the navigation of a vessel is not directly affected by the amount of her load. No doubt one effect of a regulation, confined as this one is to the number of passengers to be taken on board a vessel, is to promote the safety of passengers by insuring the safe navigation of the boat in which they are carried. But the safe navigation of other boats is, or may be, also directly affected by such a regulation. The ability of a vessel to stop, to turn, to give room in shallow water, depends, or may depend, upon her load, and her ability in these respects affects, not only the safety of her passengers, but the safety of passengers on other vessels navigating in the same locality.”

DEADY, D. J., in “*The City of Salem*,” 38 Fed. at page 763, says:

“I adhere to the ruling made on the exception to the libel, that the act of carrying this excess of passengers, being plainly contrary to a regulation of commerce prescribed by Congress, which, in the deliberate judgment of that body, is necessary to maintain the safety and security of the river as a highway of interstate commerce, will not be held

legal by me, sitting in this court, on the ground of unconstitutionality of the regulation."

MR. JUSTICE WOODS, in *Hartranft v. DuPont*, 118 U. S. at page 226, says:

"The purpose of Title 52 is primarily the protection of the passengers and crew and property on vessels propelled by steam. The law was passed also to protect the lives and property of persons on other boats and at the wharves."

The statute very simply claims: "It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection." There is no requisite that the unlawful act shall *knowingly*, or *intentionally*, or *wilfully* be done. Nor is there such a suggestion in the whole act. These elements do not belong in the statute as SLOAN, J., in *United States vs. Stofello*, 76 Pac. at page 612, says:

"It will be noted that the statute, in plain terms, makes the selling, giving, or disposing of intoxicating liquor to an Indian, a ward of the Government, under the charge of an Indian superintendent or agent, a crime. The word 'knowingly' is not used in the act, nor is any word of similar import found therein. An examination of the authorities has satisfied us that the offense created by the statute is of that class of crimes in which *knowledge or guilty intent is not an essential ingredient*, and need not be proven. *The doing of the prohibited thing is made an offense, without regard to the purpose or intent.* Such crimes are in the nature of police regulations, imposing criminal penalties for their

violation, without regard to purpose or intent. *The object of such statutes is to require such diligence as will render their violation impossible, the end sought being the protection of the public.*"*

The same principle is announced by the District Court of the United States in the case of *United States vs. Leathers*, where it was said, in 26 Federal cases, No. 15,581, that:

"The defendant is charged with trading in the Indian country in one count, and with introducing liquors there contrary to the statutes of the United States in another. The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not *malum in se*. The object of the law is not to punish men for these acts as crimes, so much as to prevent trading and intercourse with the Indians otherwise than as the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances, I think it is immaterial with what intent the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability (3 Greenl. Ev. Sec. 21), and being such, ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the lines. He is bound to know the facts and obey the law at his peril. *Id.*; *Reg. v. Woodrow*, 15 Mees. & W. 404; *Attorney General v. Lockwiid*, 9 Mess. & W. 378; 1 Bish. Cr. Law (4th Ed.) 1031, etc.

In the case of *U. S. v. Anthony* (Case No. 14,459), the defendant was charged with illegal voting. The

*Italics ours.

case was tried by Mr. Justice Hunt, and although it appeared that the defendant sincerely believed she had a right to vote, it was held that this did not excuse her. So, on the trial of the inspectors of election for receiving her vote, they proved their good faith, but their ignorance of the want of proper qualifications was held to be no excuse. Cited in Whart. Cr. Law, Sec. 82.

In the case of *Com. v. Mash*, 7 Betc. (Mass.) 472, a woman who honestly believed her first husband to be dead was convicted of bigamy, he not being in fact dead when she married a second man. In this case sentence was reserved and a full pardon obtained. The same doctrine is maintained in England, 3 Whart. 84. So in *State v. Ruhl*, 8 Iowa, 447, the defendant was not allowed to prove that he believed, or had good reason to believe, the girl he enticed away was over fifteen, the law confining the offense to girls under that age. The same principle was asserted in *Reg. v. Olifier*, 10 Cox, Cr. Cas. 402, one judge saying a man dealt with the girl at his peril, and that it made no difference that the girl told him she was over sixteen.

The following cases are cited in Section 8, 3 Whart. Cr. Law: It is no defense to an indictment for voting without the proper qualifications, that the defendant believed he had them. No matter how honest his belief is, unless the statute excepts cases of honest belief. To an indictment for publishing a libel it is no defense that the defendant did not know of the publication. Nor to one for selling liquors to a minor, that the defendant believes the vendee to be of full age. Nor to one for

abduction, that the motives were philanthropic, or that the defendant mistook the girl's age.

In this class of cases the offending party is subjected to penalty for the act done irrespective of his intent, as in civil cases he is required to answer for an act which injures another, however innocent of intentional wrong he may be. My conclusion is, that defendant must be adjudged guilty on both counts. The belief of the defendant in connection with the acts of government agents in setting up the posts can only be considered to determine whether a prosecution shall be begun in the first place, or the degree of punishment in case of conviction, or as ground for a pardon or remission of the forfeitures and penalties."

And with respect to this very statute in question, it has been adjudged that "knowledge" of the unlawful act is not an element of the violation.

DEADY, D. J., in "The Idaho," 29 Fed. at page 191, said:

"This itself is not a crime, nor does the statute make it such. To secure obedience to the statute limiting the number of passengers that may be taken on board, a penalty is imposed on the owner for its violation, although he may in fact have been ignorant thereof."

Therefore, since "knowledge" and "intent" are not elements of this statutory offense, they cannot be judicially legislated into the statute because courts have no such power as MR. JUSTICE BREWER fully states in

United States vs. Goldenberg, 168 U. S. at pages 102-103:

“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.”

And courts must yield to the legislative intent, as declared by MR. JUSTICE DAY in *Low Wah Suey v. Backus*, 225 U. S. at page 476:

“If it be admitted that the present is a hard application of the rule of the statute, with the effect of such law this court has nothing to do. The provisions of the statute are plain, and it was passed by Congress with full power over the subject. In our view the present case is brought within the terms of the law, when given a reasonable construction with a view to effecting its purposes. If it ought to be amended so as to except from its operation alien wives of American citizens, that result can only be legitimately obtained in the exercise of legislative authority.”

And if the application of the law to the facts of this

case seems harsh (and it need not be so in the slightest degree), yet the Courts should not, and cannot take upon themselves the power to mold this nationally applied safeguard of life and property to favor a particular litigant.

MR. JUSTICE HARLAN, in the case of Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. at page 474, says:

“It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. * * *

The court cannot mold a statute simply to meet its views of justice in a particular case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the Supreme Law of the land.”

Referring again to this alleged defense herein, and granting for the sake of argument, that the crowd in the first instance was unmanageable, that there was no knowledge of the number of passengers on board the

boat, and no intent to violate the law, these proposed defenses absolutely fail when the officers of the "Melville" intentionally take on board from the log raft at St. Helens an orderly crowd whom they had ample time to ascertain were in excess of the number of persons they were allowed to carry, for the purpose of transporting them back to the wharf. Here then, it is submitted is not even the semblance of a defense to the violation of the above statute.

IN CONCLUSION IT IS SUBMITTED:

First: That nowhere is it shown in the evidence that the people were unmanageable, or that once on the boat, the officers could not have requested or forced them to leave, or have held the boat at the slip until they did leave. So many methods of avoiding a violation of the law suggest themselves to the ordinary mind that those charged with the custody of human life and property should be compelled to exercise proper care and duty in their protection.

Second: By the decision of the trial court "knowledge" and "intent" of the officers of the boat in committing the offense, are made elements of the offense to be proved by the Government. These elements are not required by the statute, but are really negatived by Sections 4467 and 4468 R. S. The legal authorities clearly hold that in offenses *mala prohibita*, which are in the nature of police regulations as this statute is, proof of these elements is not material unless made so by statute and such requirement is expressly omitted here. Courts, where the intent of Congress is clear, must yield to that intent, and give effect to the general purpose of the en-

actment and not decree into the statute, requirements not put there by Congress, in order to relieve any particular case of severity.

Third: The principle involved in this case is of the utmost importance in enforcing the laws relating to the carrying of excess passengers on passenger vessels. And if, in view of this decision of the trial court, there is injected into this act and it is made incumbent on the Government to show "intent" and "knowledge" of the offense on the part of the officers of the overladen vessel, it will make practically impossible the enforcement of one of the most important provisions of the steamboat inspection laws having to do with the safety of life and property.

Respectfully submitted,

CLARENCE L. REAMES,
United States Attorney for Oregon.

ROBERT R. RANKIN,
Assistant United States Attorney,
Proctors for Appellant.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Libellant and Appellant,
vs.
CALLENDER NAVIGATION CO. (a Cor-
poration), Claimant of the Steamer
"MELVILLE",
Appellee.

Brief for Appellee.

STATEMENT OF THE CASE

It is contended in this case by the government, that the steamtug "Melville" owned by the appellee, on October 12, 1912, carried more passengers than permitted by its certificate of inspection, and, consequently, the penalty prescribed by sections 4465 and 4499, Revised Statutes of the United States, should be imposed. And to enforce such penalty, this libel in rem was instituted, and this appeal prosecuted.

The evidence submitted at the trial is very brief. There is really no conflict in the testimony. The government called out one wit-

ness, a Mr. H. F. McGrath, Chief Inspector of Customs of the Port of Portland, who testified that on October 12, 1912, whilst standing on the hurricane deck of the steamer "T. J. Potter" as the steamtug "Melville" steamed along by, he counted the passengers then on the tug and his "ticker" registered 119.

He further testified that when the tug steamed back again, his "ticker" indicated 120. It was admitted that the tug "Melville" was not permitted to carry to exceed 75 passengers at that time.

The above is all of the testimony and evidence offered on behalf of the government.

The appellee established the following state of facts, namely:

That on October 12, 1912, the day in question, the St. Helens Ship Building Co. had completed a large steamboat named "Multnomah" in its ship yards on an island in the Columbia River opposite the Town of St. Helens, a distance of about one-quarter of a mile from the dock at St. Helens, and had issued a number of invitations to the steamboat men on the Columbia River to be present and witness the launching of such boat, which was to be in the afternoon of that day. This was the first launching of a steamboat of that size and character on the Columbia River, and was quite an event, particularly among steamboat men, and the event was very widely attended. At that time, the appellee Callender Navigation Co. was the owner of the steamtug "Melville", which it employed in the tug business. This tug was, naturally, very

strongly built and quite powerful. It could carry with perfect safety over 200 people. The tugboat had never been employed as a passenger boat, although it was well fitted up and suitable for that purpose, and the license to carry passengers had been obtained as a mere matter of convenience to the general manager, Mr. C. H. Callender, so that he and his family could entertain their friends. Mr. Callender, general manager of the appellee, received an invitation to be present at the launching of the steamboat "Multnomah", and the steamtug "Melville" being at that time available, he conceived the idea of inviting a number of his personal friends to journey from Astoria, Oregon to the St. Helens Ship Building Co. to witness the launching. He, therefore, invited not to exceed 15 of his personal friends, and on the morning of October 12, 1912, they went aboard the boat at Astoria and proceeded to the ship yards of the St. Helens Ship Building Co. The incident that took place and the events that caused the carrying of the number of passengers complained of is best related in Mr. Callender's own words (Apostles, pages 41-45.)

Q. I wish you would detail to his Honor here the facts pertaining to the taking and carrying of these passengers with which you are charged. Just explain it.

A. Well, I invited a few of my own friends in Astoria to make that trip, to go up and see the launching of this big ship. As long as it had been the first one that was launched in the Columbia River, it was quite an event. I think

there were about 12 or 15 of us took the boat in the morning and figured on getting up there possibly an hour before the launching—figured on looking around the mill. We were a good deal longer coming up than we figured on. When we arrived at St. Helens dock, was going by there, we realized it was just about the time the ship was to be launched. Going by the wharf there, we saw quite a number of people on the wharf, and we heard somebody hallooing. And I looked over there and saw several of my friends there—Mr. Morton, Mr. Yeon and Mr. Brady, and Mr. McCormack, and two or three people from Astoria, Mr. Halterman and several others. So I snug out to the captain to swing around and make a landing, and we would pick those people up. As we went in there was a wide slip, possibly ten or fifteen feet wide. As we started to go in there, these people began to jump into that slip. We ran the nose of the boat in there, and Mr. Morton was pretty well back of the crowd with his folks, and in trying to get them through the crowd, and get them down there, of course everybody began to jump aboard. I tried to hold them back. They all halloosed there was no other boat—"We can't get up there." In our efforts to get Mr. Yeon and Mr. Brady and Mr. Morton and the ladies aboard, this crowd kept piling in. I didn't realize there was anybody coming on top of the boat till after we started to back away, I saw a whole crowd of them on the boat, jumping over on top of our house. Of course, we tried to stop them just as soon as I saw the rush. But when

they started to crowd into the slip there like a lot of cattle, people on back end of the slip shoving the front ones aboard the boat, if the boat had pulled away very suddenly it would have pulled them all overboard. As soon as we stopped and got our boat away, we backed right away. We didn't have lines out or anything else. We just had her nose up against the dock. We stopped and backed her away as soon as we could, till they realized they was going to get overboard, then they hallooed "quit". We proceeded up close to the dock and along close to the log rafts. I don't think any of the time we was more than two or three lengths of the boat away from the shore. We tied up to the log raft right across from where the launching took place. As soon as the steamer was in the water we went right back to the dock and put this crowd off. I don't think it was over a quarter of a mile from the wharf up to where the ship was launched. It possibly might be a little more, but I don't think it is.

(Examination by the COURT.)

Q. You took the same crowd back that went over?

A. Yes, the same crowd back. I don't think anybody got off. Of course, there were a few people, after the boat tied up to the log-raft, got off. I did. I was in the lumber business—while I was waiting there for the launching, I got off on the raft, and several people got off.

Q. Were there any people on the raft.

A. I think there were. There was a lot of these little fishing boats and pleasure boats, and

two or three rafts of logs all up and down the slough, quite a number of boats tied up there, and people walking around on the raft, as I remember.

Q. Do you remember whether any more people got on your boat?

A. No, I am satisfied there wasn't anybody got on there. I don't think they did.

Redirect Examination.

Q. Was there any charge made for any of these people?

A. No charge at all. We were simply out for a picnic.

Q. Would you have permitted these people to have gotten aboard, could you have avoided it?

A. I should certainly not. I didn't want them aboard there. We had a little party of our own, and we had some refreshments served in the cabin there, some sandwiches and things. We were just having a little party. I didn't want any strangers aboard the boat. I didn't know these people.

Q. They were not friends of yours?

A. I didn't know any of them, with the exception of just that few that I went in there to pick up.

Mr. FULTON.—I assume your Honor is familiar with the waters around St. Helens.

A. It is in a slough. It is not in the main river. From the St. Helens dock up to where we took these people, up to the shipbuilding plant, it is just a narrow slough. I don't think the slough is over a quarter of a mile wide.

Q. How is it protected against storms?

A. Absolutely no chance for any rough water in there. It is just like a millpond in there, just like a lake, up from the St. Helens boom to the mill, extends up clear to the shipbuilding plant, there were rafts moored clear along there. I don't think at any time we steered more than a couple of boatlengths away from those logs. There was absolutely no danger at all.

Q. How many people could your boat at that time safely have carried?

A. We could safely put 200 people on that boat, without crowding her very much. Big open-deck tug-boat—she has open deck all the way around her. Her stern is a big open stern and her bow the same. And then on top of her house there is lots of room. I think 200 people could be carried.

The testimony of Mr. Callender was corroborated by his three friends, for whom he made the landing at St. Helens. The government made no attempt whatever to contradict any statement made by Mr. Callender, or his friends, and offered no testimony in rebuttal. It is, therefore, fair to assume that the statements made by Mr. Callender and verified by the witnesses called on his behalf were in every respect true.

Another important matter which we wish to call the Courts attention to is, that it is not contended by the government that the carrying of the passengers complained of was other than as stated by Mr. Callender and his witnesses: and no contention is made that the officers of the

tugboat sought to evade the law by any subterfuge. No charge whatever was made for carrying these passengers—in fact, it is too apparent that they were not wanted on board the boat and came on there against the will and protest of the general manager of the appellee and the officers of the boat. Indeed, they forced themselves on the boat, and the officers were powerless to prevent it.

The contention of the government in this case is to our mind rather remarkable to say the least. As we understood the United States Attorneys in the court below, and as we read their brief in this case, it is contended that the penalty prescribed by Section 4499, Revised Statutes of the United States, must be as of course be imposed upon every vessel which carries a passenger beyond the number authorized by its certificate of inspection. And that intent or knowledge on the part of the officers and owners has nothing whatever to do with the question. It is argued at great length that inasmuch as it has been held by the Federal Courts in prosecutions under the above mentioned section, that it is not necessary for the government to show, in the first place, knowledge or intent on the part of the officers of an offending vessel, that there can be no excuse interposed, where the evidence shows that the passengers carried exceeded the limit. The Court below did not entertain this view of the law, and dismissed the libel.

The government prosecutes this appeal.

Points and Authorities.

I.

Section 4465, R. S. U. S. reads as follows:

“It shall not be lawful to **take** on board of any steamer a greater number of passengers than is stated in the certificate of inspection.”

It will be observed that the prohibition is against the taking, not the carrying against the will and consent of the officers, nor against the taking against the will and consent of the officers. Although the government in a suit to recover a penalty under Section 4499, R. S. U. S., is not required, in the first instance, to show that excess passengers were carried with the knowledge of the officers, or any of them, yet it does not follow that the officers may not justify their acts in so doing; neither does it follow that the penalty must be imposed, even though the officers were powerless to resist carrying excess passengers.

We submit that the offense is confined to a voluntary taking of passengers in excess of the number stated in the certificate of inspection.

The Geneva, 26 Fed. 647.

The Nelson, 149 Fed. 846.

II.

As we understand it, the government admits in this case that the facts detailed by the evidence on behalf of the appellee were true, and the defense interposed by appellee is an honest one, and all of the facts occurring at the time were honestly and correctly detailed.

The only contention on the part of the government is, that under the facts disclosed by the

evidence offered in defense, which are admitted to be true, the penalty, nevertheless, must in law and in equity be imposed. We believe it to be the universally accepted construction of the sections in question, namely, Sections 4464, 4465 and 4499, R. S. U. S., that where passengers obtrude themselves on board a steamboat against the will and consent of the officers, under circumstances which ordinarily could not be prevented, does not subject the boat to the penalties prescribed by these sections.

The Geneva, 26 Fed. 647.

The Nelson, 149 Fed. 846.

Argument.

I.

We agree that the rule is well settled that in proceedings in rem instituted by the government to recover the penalty imposed by Section 4499, R. S. U. S., the government is not required to establish the fact that the officers of the offending steamboat had knowledge that the boat was carrying passengers in excess of its certificate of inspection. This, in our judgment, has absolutely nothing whatever to do with this case. The only proposition involved in the case, as we understand it, is whether or not the facts detailed by the witnesses for the appellee, which are admitted to be true, are a justification on the part of the appellee in carrying excess passengers. While we do not admit it to be a fact that the evidence shows the "Melville" did carry excess passengers on October 12, 1912, yet it seemed to be the opinion of the Court below that the evidence established that fact, we

are willing to accept the findings of the learned trial judge as the facts in this case. But the trial judge held that the facts established by the appellee were such as not to bring it within the inhibition of the above mentioned sections.

We respectfully submit that there are many instances that might well arise, which naturally suggest themselves to this Court, without enumeration, where a steamboat might well carry an excess of passengers, and there are other instances which also might naturally arise, which likewise suggest themselves to the Court, where a steamboat might be compelled to carry an excess of passengers, and in neither case subjects itself to the penalty prescribed by this section.

We find a demonstration of these propositions in the two cases, namely, *The Geneva*, 26 Fed. 647, and *The Nelson*, 149 Fed. 846.

In the latter case, Judge Hanford, in an excellently well prepared opinion, stated the law to be as follows:

“A Court of equity may, in the exercise of a wise discretion, refuse to impose upon the owner of a steamboat the penalty prescribed by section 4465 for carrying more passengers than the number allowed by the vessel’s inspection certificate, where, because of extraordinary conditions existing, such imposition would be inequitable.”

In a case parallel with the case at bar, Judge Acheson, in *The Geneva*, 26 Fed. 647, lays down the rule that where more passengers than are permitted by the vessel’s certificate of inspec-

tion force themselves on board a steamboat against the consent and protest of the officers. under circumstances identical with the facts in this case, that the penalty prescribed ought not, and, as a matter of law, should not, be enforced.

The counsel for appellant in their brief have sought to avoid the force of the above case, by selecting short excerpts from the testimony of the witnesses on behalf of the appellee and have drawn a deduction therefrom not intended by the witness and far from being a fair construction of the witness' entire testimony, attempting to show that there was no rough element in the crowd, and that the officers had neglected to use meat axes, knives, shot guns and crow-bars in preventing the crowd from forcing themselves on the boat. The overwhelming testimony shows that the "Melville" simply put its nose against the slip on the St. Helens dock; that the vessel was not moored, and no lines were thrown out or made fast. The evidence also shows that this slip had a drop of about 33 degrees and was about 10 or 15 feet wide. The evidence shows that the crowd simply filled this slip, and those behind, in their eagerness to get aboard, shoved those in front practically onto the boat. The evidence is also overwhelming that the boat could not have been backed away from the slip without precipitating a number of women and children into the waters of the Columbia River. And because the officers of the boat did not do this, and did not drown a few of the citizens of Oregon, an argument is made that the officers could have prevented these

people from boarding the boat. The Court will read this testimony and will give it a fair interpretation, and will consider it in the light those present at the time viewed it.

It is inconceivable that Mr. Callender, manager of the appellee and who had charge of the "Melville" at this time, desired these people on the boat. He had with him his personal friends, and he also had provided for his guests special refreshments for their particular use, and in landing, he anticipated only in taking aboard three or four of his personal friends with their families, not to exceed a dozen people.

It is, therefore, fair to assume that it was farthest from the intention of the officers of the boat to take any on board other than Mr. Yeon, Mr. Brady and Mr. S. C. Morton, and his lady friends. No compensation was attempted to be made for carrying these passengers, and none was contemplated.

Furthermore, the evidence shows that the crowd on the wharf sprang onto the boat from every conceivable position, a large number jumped from the wharf down onto the upper deck, others came on aboard at the stern, others on the side. Indeed, the rush was so great that parents parted from their children, in the mad rush to board the tug.

It is quite true, in the case of *The Geneva*, the officers gave a rather lurid description of some of the individuals who were not on the boat. That, we apprehend, had nothing whatever to do with the principle announced in that case. Mr. Callender was not a pugilist, was not a

fighting man, and we think it is fair to assume that Mr. Morton was not either, although he made the statement that he would have gone aboard any boat that came along, and it is fair to assume that such was the intention of the people there.

It is true the occasion brought forth quite a large body of people; it is also true that they were good people; and that is, doubtless, one of the reasons why it was not the desire of the officers of the "Melville" to precipitate any of them in the river and thereby cause their death.

Mr. Callender testified that he succeeded in stopping the crowd before he thought that there were more on his boat than it was authorized to carry, but he did not know that so many had gotten on the boat other than through the slip. It was impractical for him to return to the wharf, or tie up there. Had he returned, he would have been forced to receive a greater crowd. The boat was absolutely safe, the waters were practically a millpond, and there was absolutely no danger to any passenger.

But above all, it seems there can be no question but that the officers of that boat did not wish these passengers. The boat did not land for them, the officers protested and objected to their coming aboard, and the boat could not have been backed away from the wharf without loss of life.

The Court below, an eminent jurist, heard the testimony offered on behalf of the appellee, he saw the witnesses, many of them he knew personally, and after listening to their evidence and

giving the same a fair interpretation, followed the rule announced in the two cases above mentioned.

The amount involved in this appeal is not very large, and the facts do not justify, in our judgment, the prosecution of an appeal to this Court. The appellee was advised that it had not violated the law, and it frankly submitted its case to the Court below, being then and there ready and willing to abide by whatever judgment the District Court should enter. Doubtless, had it thought that this case would be appealed to this Court, rather than to have gone to the expense of defending it in this Court, it would have paid the government any reasonable sum of money simply to buy its peace.

If it is the intention of the government to appeal every case of this character and put an innocent defendant to the expense of defending in both Courts, even though the defense should be perfect, any attorney having the interest of his client at heart, when a claim of any character is filed by the government, would naturally advise that it should be paid. This is, evidently, the theory of this appeal.

While it is true the United States is complainant in this case, we submit that the prosecution is moved by men the same as the defense is sustained by men, and, in that regard, we trust this Court will assume they are equal.

The defense interposed here is an honest one. No contention is made but that every witness for the appellee honestly stated everything that occurred as he saw it. It is also admitted that

the appellee made no charges, and never intended so doing. It must also be admitted that the officers of the "Melville" did not wish any of the passengers to board the boat to exceed 12 people. It must be conceded that all above that forcibly went aboard the tug against the earnest protest and objection of the officers. It must further be found that the officers were powerless to prevent them from so doing. This taken with the fact that when the crowd started to board the tug, it could not back away from the wharf without precipitating a number of people into the waters of the Columbia River, all of whom, undoubtedly, would have been drowned.

These being the facts as found by the Court and as clearly established by the evidence, we respectfully submit that the decree of the Court below ought to be affirmed.

G. C. FULTON,
Proctor for Appellee.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

IN ADMIRALTY.

UNITED STATES OF AMERICA
Libellant and Appellant

vs.

THE STEAMER "MELVILLE," her Tackle,
Apparel, Furniture, Etc.
Defendant

CALLENDER NAVIGATION CO., a Corpo-
ration,
Claimant and Appellee.

Reply Brief of Appellant.

STATEMENT.

This reply is not made because of any oversight in the original brief. It relates to matters beside the direct line of liability indicated therein. The purpose of now adding this statement and authorities is to apprise the Court of the Government's knowledge of adverse rulings on the question now to be adjudged, to suggest a rem-

edy, to pray that that the trial courts be directed to follow the remedy indicated by the legislature, and while called a reply brief, it is not strictly such because written before appellee's brief has been seen, but in anticipation of a very apparent defense of that party.

POINTS AND AUTHORITIES.

I.

Under extremely mitigating circumstances two district courts have dismissed libels under this section to recover penalties for overcrowding:

(1) Because of intrusion against will and under a species of compulsion;

(2) Because of intrusion of those who came on board in the darkness and when there was no intent on the part of the ship owners to violate the law.

(1) "The Geneva" (D. C. W. D. Pa. 1886) 26 Fed. 647.

(2) "The Charles Nelson" (D. C. W. D. Wash. 1906), 149 Fed. 846.

II.

When parties have been found guilty of this violation and mitigating circumstances appear in the case, upon proper presentation thereof to the Secretary of the Treasury, the penalty may be remitted in whole or in part.

Authority for this remission is found in Section 5294 Revised Statutes:

"The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to

vessels or discontinue any prosecution to recover penalties or relating to forfeited denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of an informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

The discretion of the Secretary of the Treasury could be safely trusted in such matters, and furnish a much safer guide than could be afforded by judicially excepting certain cases like the one in question from the scope of the law.

"The Scow No. 1" (D. C. E. D. N. Y. 1909),
169 Fed. 717.

"The Laura" (1885), 114 U. S. 411.

III.

The courts must yield to the intent and purpose of the legislature (Appellant's Brief, page 19) and if the statute is to be amended to prevent its operation in particular cases, that result can be accomplished only by an exercise of legislative authority.

Suey vs. Backus (1912), 225 U. S. 460, 476.

ARGUMENT.

After diligent search, only two reported cases have been found, adjudicating a point similar to the one in question. These cases, "The Geneva" (which will be called the "grape-and-cannister" case) and the "Charles Nelson" (which will be called the "rescue ship" case), are easily distinguishable, but it is hoped this court will go further and correct the "legislative" tendency of the District Courts and throw the remedy for harsh penalties, if any there be, into proper channels.

The case of the "Geneva" was one in which a steam-boat *licensed to carry 300*, carried 500 passengers, *a distance of two squares*, where, *by persuasion of its officers* and their own apprehensions, *all but 200 disembarked* and the boat proceeded on its excursion trip with *less than the licensed number*. When the "*immense mass*" of people attempted to board the boat, *staging was torn away to stop them*, the officers "*exerted themselves to the utmost* to prevent persons getting on the steamboat," and the man in charge stated:

"*Had I had two cannon with grape and cannister I could have kept the people off, but not otherwise.*" The Court said: "It was impossible for him (the captain) to disembark his passengers at that time and place (wharf where the crowd embarked); nor had he the force to expell intruders. Indeed, *had he attempted such a thing, it would have brought on a serious riot.* There were many rough characters in that crowd, both on and off the Geneva. *Capt. Clark, therefore, was in the strict line of his duty* when he moved the Geneva

from the mouth of Wood street down to Ferry street" (two blocks).

The case of the "Charles Nelson" was a libel *by disgruntled passengers* to recover penalties because of discomforts suffered by having 14 extra steerage passengers aboard on a trip from San Francisco to Seattle. Only the licensed number of tickets were sold and all other applicants were refused passage. But 11 steerage passengers and 3 stowaways *sneaked aboard* under cover of night and *were not observed until the boat was some hundred miles at sea*. The voyage was two or three days longer than usual by reason of stormy weather which, together with the overcrowding of steerage quarters, lack of food, fuel and slow means of securing fresh water created the discomforts complained of. The Court through Hanford, D. J., said:

"It is the opinion of the court, however, that the extraordinary conditions existing at San Francisco when the voyage was undertaken (May 2, 1906) justify and require the exercise of judicial discretion and that according to the principles of equity the libellants are not entitled to prevail.

* * * The appalling disaster which suddenly rendered a great multitude of people in San Francisco homeless and destitute is a matter of common and general knowledge, and due credit should be given to the generous impulses of officers and managers of railroads and steamship lines which prompted them to make extraordinary exertions to facilitate the emigration of the many who hastened to leave the ruins and desolation which sur-

rounded them in that city. It is plainly apparent that the desire of the libellants to get away from San Francisco was too strong to admit of any questioning of the sufficiency of the accommodations afforded by the Charles Nelson before going on board of her, *and their demands are as ungracious as would be the case if they had been castaways and were suing a rescuing ship which had brought them away from a desolate shore.* The evidence proves that the officers of the Charles Nelson did not intend to oppress the libellants nor to violate the law by receiving on board an excessive number of passengers, and the overcrowding of the ship was occasioned by the intrusion of those who came on board in the darkness."

The italicised portions of the above cases are ours to indicate grounds of very apparent distinction between them and the case of the "Melville." Though these cases were not actuated by the same principles that prompt the government (both being for financial gain), and are ~~indistinguishable~~ *it is hoped that this Court will correct the* reasoning of the District Courts and in accordance with the rule laid down by the United States Supreme Court, viz.: Courts have no legislative function but should yield to the intent of Congress and not mold a statute to meet the views of justice in a particular case, force the trial courts to ascertain whether or not there has been a violation of the statute in accordance with the intent of Congress, with the question of the "intent" and "knowledge" of the violater removed from consideration.

Upon conviction, if the fixed penalty of \$500 is

thought to be harsh or unconscionable, the aggrieved parties may lay the case before the Secretary of the Treasury, and have justice done without embarrassment to the judicial branch of the Government.

Nothing indicates that the trial courts in the "grape-and-cannister" and "rescue-ship" cases had this pardoning statute suggested to them as a relief from an alternative of working a hardship or enacting "judicial legislation." We respectfully submit the following as an accurate description of the facts and an indication of the remedy in severe cases. CHATFIELD, District Judge, for the Eastern District of New York, stated in the decree in "The Scow No. 1" (*supra*), that:

"It is unnecessary to enlarge upon the disaster which might have resulted if any accident requiring the use of boats or life-preservers had occurred. The examples are many, and the necessity for regulations with relation not only to boats in the passenger-carrying business, but to boats used for more or less charitable purposes, is admitted by every one. Many of the most distressing instances of great loss of life have been in connection with such expeditions as Sunday school picnics and children's parties at theaters and other public places. The hardship that may be involved to the charitable and well disposed in complying with requirements providing precautions which may be entirely unnecessary (if nothing occurs) cannot be weighed in the balance with the tremendous loss of life which may result through the natural feeling that the law was not aimed at people of such good intentions and good character. Nevertheless, no amount of respect for the law and willingness to abide

by it, where no hardship is involved, can restore those who might be lost or injured if the possible accident should occur.

It has been well established in many cases, including the *Hazel Kirke* (C. C., 25 Fed. 601; *The Garden City* (D. C.), 26 Fed. 766; *The City of Salem* (D. C.), 37 Fed. 846; *The Oyster Police Steamers of Maryland* (D. C.), 31 Fed. 763; and *Hartranft v. DuPont*, 118 U. S. 225, 6 Sup. Ct. 1188, 30 L. Ed. 205—that all vessels carrying passengers within the jurisdiction of the United States under either the interstate commerce clause or the admiralty provisions of the Constitution) are liable to the regulations provided by statute. * * *

“A violation of the statute, if disaster followed, must necessarily be severely punished. If the excursion happily proceeds without accident, the matter may be less serious, and it is suggested that an application to the Secretary of the Treasury, under the provisions of section 5292 of the Revised Statutes (U. S. Comp. St. 1901, p. 3604), would be the proper procedure. The discretion of the Secretary of the Treasury could safely be trusted in such matters, and furnish a much safer guide than could be afforded by excepting charitable or casual excursions from the scope of the law. If the claimant in the present case, instead of disputing jurisdiction, should lay the matter before the proper authorities, he probably will find full justice and avoid opening the door to those who desire to be put to as little expense as possible in protecting life,

even in matters as to which Congress has deemed it necessary that such protection should be afforded."

IN CONCLUSION, IT IS SUBMITTED:

First: The decisions in the "grape-and-cannister" and "rescue-ship" cases are attempts to relieve them of severity as against informants claiming financial benefit. These cases are otherwise distinguishable from the "Melville" case on their facts. Their reasoning under the purpose sought to be effected is dangerous to the enforcement of a salutary law of the United States. The amendment they effect can only be accomplished by congress.

Second: That a rule should be promulgated governing the trial courts in their interpretation of this statute, which will adjudge that "knowledge of" and "intent to commit" the offense are not elements thereof; that the doing of the unlawful act is sufficient to constitute the violation which is penalized; that severity in any particular case will find adequate relief in the conscience of the Secretary of the Treasury.

Third: That a decree should be entered against the "Melville" and the claimant and in favor of the United States.

Respectfully submitted,

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